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**CASES AT LAW AND IN EQUITY,**

ARGUED AND DECIDED IN

**THE COURT OF APPEALS**

**THE COMMONWEALTH OF KENTUCKY.**

**BY J. J. MARSHALL,**

**REPORTER OF THE DECISIONS OF THE COURT OF APPEALS.**

**VOLUME VII.**

**CONTAINING THE CASES DETERMINED BETWEEN THE 31ST OCTOBER, 1831,  
AND THE 5TH NOVEMBER, 1832, INCLUSIVE.**

**FRANKFORT,**

**W. B. CHAMBERS, PRINTER.**

**1834.**

161039  
KFK  
1246  
V. 20

UNITED STATES OF AMERICA; }  
DISTRICT OF KENTUCKY. } SCT.

BE IT REMEMBERED, That on the eighteenth day of June, Anno Domini, one thousand eight hundred and thirty-four, JOHN J. MARSHALL, of the said District, has deposited in this office, the title of a book, the title of which is in the words and figures following, to-wit :

“Reports of Cases at Law and in Equity, argued and decided in the Court of Appeals of the Commonwealth of Kentucky, By J. J. Marshall, Reporter of the Decisions of the Court of Appeals. Volume VII. Containing the cases determined between the 3<sup>d</sup> October, 1831, and the 5th November, 1832, inclusive.”

The right whereof he claims as author and proprietor, in conformity with an act of Congress entitled, “an act to amend the several acts respecting copyrights.”

JOHN A. HANNA,  
*Clerk of the District of Kentucky.*

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## CASES

ARGUED AND DECIDED

IN THE

### COURT OF APPEALS,

From the 31st Oct'r, to the 15th Nov'r, 1831.

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#### Douglass vs. Holbert.

CHANCERY.

Error from the Breckenridge Circuit; A. McLEAN, Judge.

Case 1.

*Injunction. Witness. Competency. Practice.*

Judge BUCKNER delivered the opinion of the Court.

October 31.

R. STEPHENS on the 1st of October 1819, executed his obligation to Douglass binding himself, to convey to him, one hundred and twelve acres of land.

On the 24th of October 1825, Douglass executed a written lease of the land to I. Sandford and Robert Hoskins, for the term of two years, from the first of March, next thereafter. On the 27th of September 1826, Douglass sold the land to Holbert; assigned to him, the bond on Stephens, for a conveyance, and delivered to him, the written lease. In May 1827, Holbert filed his bill in chancery, praying for an injunction against a judgment recovered against him by S. Scott, on a note for \$100, which he, Holbert, had executed to Douglass, as a part of the price agreed to be given for the land, and which had been assigned by Douglass to Scott. He alleges, as the grounds of equity, that at the time of his purchase from Douglass, it was verbally agreed between them, that he should have possession of the land by the 1st day of March 1827; and that Hoskins also agreed, that if Douglass would release him from the payment of one year's rent and pay him twenty dollars, he would, at the time above named, deliver the possession to Holbert. He makes Douglass, R. Hoskins and Scott, defendants; complains that

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**DOUGLASS**  
**VS.**  
**HOLBERT.**

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the contract had not been complied with, by delivering possession; and prays that Douglass and R. Hoskins may be compelled to comply therewith, or that it may be rescinded, &c.

By an amended bill, he alleges, that after it was ascertained, that R. Hoskins would not deliver possession as agreed upon, Douglass, to satisfy him, (complainant) for the disappointment, agreed to rent for him another farm, called the Pate-farm, and to permit him to enjoy it, until he could prevail on Hoskins to yield the possession; that in pursuance of that arrangement, Douglass did rent the place pointed out; which he agreed to accept on the terms proposed, and moved to it; but that Douglass, designing to oppress him, declared that he should not live there, and threatened to dispossess him by force; and that in consequence of his menaces, he was induced to leave it.

The circuit court entered a decree rescinding the contract; perpetually enjoining Scott's judgment; that Douglass should pay the amount of it to him; and that he should also pay to Holbert, \$467, being the amount of the consideration, and interest thereon which Holbert had paid him in part of the price of the land.

To reverse the decree rendered in favor of Holbert, Douglass prosecutes this writ of error.

Answers denying allegations of bill, though they contain equity, yet bill must be dismissed, unless there be adequate proof.

The decree cannot be sustained.—Douglass and Hoskins, by their answers expressly deny the grounds of equity relied on, in the bill; and the proof is obviously insufficient to justify the decree, admitting even, that the bill contains sufficient grounds of equity, for the interference of the Chancellor. Indeed, considering the deposition of R. Hoskins, which was taken by leave of the court, subject to any proper exception, they are satisfactorily disproved. That deposition was rejected by the circuit court, upon the ground of a supposed interest on the part of the witness. We do not perceive any interest on his part. The rescission of the contract between Douglass and Holbert, could not affect his claim under the lease. It remains the same, whether the one or the other shall be his landlord. His deposition, therefore, as to the alleged

Defendant in Ch'y a competent witness when his interest equitable between other parties.

verbal contract between Douglas and Holbert was admissible evidence. LOGAN  
vs.  
LEWIS.

The decree must be reversed, and the cause remanded to the circuit court, with directions to dismiss the bill with costs.

*Mills and Brown*, for plaintiff.

## Logan vs. Lewis.

ASSUMPSIT.

Error to the Jefferson Circuit; *PIRTLE*, Judge.

Case 2.

*Assumpsit. Debt. Common law action. Statute, George*

### II. *Use and occupation.*

Chief Justice ROBERTSON, delivered the opinion of the Court. November 1.

WILLIAM LEWIS obtained a verdict and judgment against Hugh Logan for \$45, in an action of *indebitatus assumpsit*, for use and occupation.

In addition to some evidence tending to prove the value of the use, the only proof on the trial, on the general issue, was—that a Deputy Marshal, in virtue of a *feri facias*, sold to Isaac Miller, on the 19th of May, 1827, for \$500, a tract of land, owned and occupied by Hugh Logan, which, having been re-sold with Miller's assent, to William Lewis for \$1000, the Marshal, Logan and wife, and Miller, conveyed it to Lewis, on the 23d of May, 1827,—that, at the time of the sale, Logan had “planted his corn and other crops,” and that he remained on the land until February 1828, when he surrendered the possession to Lewis.

On this state of case, the counsel for Logan moved the circuit court, to instruct the jury to find as in case of a nonsuit, because there was no proof of an express assumpsit to pay any thing for the use of the land, after the date of the conveyance. But the motion was overruled, as was also a motion for a new trial, after verdict.

It is said in some elementary books, that a statute of George II, gave the action of assumpsit for use and occupation, and that the common law allowed



LOGAN  
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no such remedy. This is a mistake, although it seems to have been sanctioned by the loose *dicta* of some Judges.

As an express lease was deemed a real contract, the common law remedy on a parol demise, was debt or distress—Assumpsit would not lie. But when there was no demise, but a simple promise to pay a given sum or *quantum valebat* for *permission* to occupy, or in consideration of having been permitted to occupy the tenement of the promisee, assumpsit was the appropriate common law action. And the statute of George II, was enacted simply to allow assumpsit for use and occupation in all cases of parol "*agreement*" for rent, including express demises, on which debt, and not assumpsit, was the appropriate common law action. But when there had been no formal demise, assumpsit for use and occupation was the usual, and perhaps only common law remedy. Wheaton's Selwyn 1078. Dartnall vs. Morgan Cro. Ja. 598. Sleeck vs. Bowsel Ib. 668. How vs. Norton, 1 Lev. 179. Epes vs. Cole, 4th Henning and Munford, 161. Smith vs. Stewart, 6th Johnson's Reports, 46.

In Buller's *nisi prius* (138)—in 2d Comyn on Con. and 6th Johnson's reports, (48) it is said that, at common law, assumpsit would lie on an *express*, but not on an implied promise for use and occupation; and that to maintain the action on an express promise, it was necessary to shew that the promise was made at the time of the *demise*. These *dicta* seem all to have been deductions from the case of Johnson vs. May, 3d Lev. (150;) and that case is not sufficient to establish any such doctrine.

It is evident that, when there was an express "*demise*," assumpsit was not maintainable at common law, on the express promise made "*at the time of the demise*." Assumpsit for use and occupation was maintainable, at common law, only when there had been no formal lease, but when there had been a collateral promise to pay for the use by the owner's *permission*. And we are unable to perceive any sufficient reason why such a promise might not be implied; nor, if implied, why assumpsit could not have been maintained upon it, as well as if it had

been express. The statute of George II, speaks only of agreements "not by deed," implying thereby, express leases or demises; and hence, if assumpsit could not have been maintained at common law, on an implied undertaking in consideration of use and occupation, by permission without lease, we should be at a loss to determine how it can now be maintained, as it certainly may be in England.

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The statute of George II, did not give it; it existed before, as both authority and analogy tend to prove. There can be no good reason why assumpsit could have been maintained on an express contract, but not on a contract implied from the fact of use and occupation under such circumstances as in any other class of cases, impose a legal obligation, by implication.

If an action could not have been brought on an express contract for rent, in consequence of the application to it of the statute of frauds, was there no remedy at common law? Surely there was; because there was still a legal liability. *Roberts vs. Tennels*, 3d Mon. Why might not that remedy have been assumpsit upon a *quantum valebat*, as it might certainly have been, if there had been an express promise to pay, in consideration of prior occupancy, as much as the use was worth? It is at least questionable whether debt could have been maintained, at common law, for use and occupation, without any lease or other express contract. If it could not have been, assumpsit could have been maintained, as a matter of course; and even if debt could have been maintained, assumpsit would have been equally appropriate.

*12w 179*  
Assumpsit was sustained in *How vs. Norton*; and it would seem that the promise in that case, was implied and not express.

Professor Wooddeson, speaking of the action of assumpsit, (3d vol. p. 152,) says, "This action is also maintainable to obtain a recompense, for the occupation of the plaintiff's land, by his permission, where there is no stipulation for any precise rent. The declaration states a promise to pay so much as the landlord reasonably deserved to have for such permission; which promise may be im-

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"plied by law: for there being no certain rent, the plaintiff could neither distrain nor properly, perhaps, bring an action of debt; this seems the plaintiff's genuine remedy."

The Court of Appeals of Virginia, decided in *Sutton vs. Mandeville*, (1 Munford) and the Supreme Court of Connecticut decided also in *Dun vs. Scoval*, (Day's cases, 229,) that assumpsit was maintainable at common law, on an implied promise in consideration of use and occupation, when there had been no express promise, or express lease.—

Assumpsit is maintainable at common law, for the use and occupation of lands or tenements, altho. no express contract or promise, a promise to pay being implied.

This we deem the true doctrine. If there had been an express lease, the common law did not imply a promise to pay the rent; and this is probably, all that Buller and Comyn meant. But when there was no express contract of lease, a promise might have been implied, and assumpsit maintained.

We are therefore of opinion that, though the statute of George II, was never in force here, assumpsit is maintainable for use and occupation, without any express contract or promise.

*In this case, although the Judges concurred on the main question in regard to the form of action, yet Justices Underwood and Buckner considered the right of the plaintiff as extending beyond the limits granted him by the Chief Justice Robertson, and the opinions on the minor question are as follows:*

Judges UNDERWOOD and BUCKNER are of opinion, from the facts stated, nothing more appearing, that the plaintiff below, had a right to recover for use and occupation. The defendant, it seems, had money and land both. An action of ejectment could have been successfully prosecuted against him, immediately after the conveyance. He occupied without molestation, and it must be taken that it was with the assent of the grantee. Under these circumstances, they think the law implies a promise to pay for the use, and consequently the jury had a right to find as they did.

The Chief Justice is of opinion, on this point, that, as the crop was growing at the date of the conveyance, and as it seems that Logan had a right to it, and the consequential right to mature and

perfect it, (for it does not appear that Lewis ever had, or asserted any claim to it,) the presumption of law, as well as of fact, is that Logan was to *retain* the possession until he could secure his crop, or in other words, during the customary year;—that he was not therefore Lewis' tenant during that year—but was to hold the land as he had held it, and was to yield the possession at the end of the year; and that, no fact appearing to the contrary, consequently the only allowable deduction is that, in consequence *merely* of the conveyance, Logan was under no implied obligation to pay for the privilege of securing his growing crop; and that the law would not, in such a case, imply an *assumpsit* to pay rent. He therefore dissents from the majority of the court on this point, and is of opinion that the facts do not sustain the verdict. But as a majority of the court entertain a different opinion, the judgment must be affirmed.

DEBARD  
vs.  
CROW.

*Denny and Breckenridge* for the plaintiff.

## Debard, &c. vs. Crow.

MOTION.

Error to the Clarke Circuit; FRENCH, Judge.

Case 3.

*Motion to quash Sale Bond and Execution. Co-obligors being co-obligees.*

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Chief Justice ROBERTSON, delivered the opinion of the Court. November 2.

A *fieri facias* having been issued on a sale bond executed by Henry Crow as principal, and by Henry Debard and Harvey Debard as sureties, to Henry Debard and Harvey Debard and several others, all heirs of Ephraim Debard, Crow, in his own name and in those of his sureties, made a motion to quash the execution and sale bond, because the sureties were both co-obligors and co-obligees.

The circuit court, notwithstanding the opposition of all the obligees, quashed the execution and also the sale bond; and to reverse that judgment this writ of error is prosecuted.

No action at law could be maintained on the bond against the sureties, who are co-obligees, and have

No action can be maintained by a party against himself. He cannot enter into a legal obligation to himself.

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by their own act, made themselves joint and several co-obligors. They cannot sue themselves—and therefore, as to them, there being no cause of action, there is no legal obligation. Sanders's heirs *vs.* Sanders's ex'rs, 2d Littell's Rep. 321. Thomas *vs.* Thomas, 3d *Ib.* 8. Allin, &c. *vs.* Gray, 1st Monroe's, 98. Suttles *vs.* Whitlock, 4th *Ib.* 452. Lyle *vs.* Gatewood, 5th *Ib.* 6.

But we cannot perceive why a suit might not be maintained on the bond against the principal obligor who is not an obligee and whose obligation is legal, and several as well as joint.

If the obligees in a bond become sureties to themselves they incur no legal obligation, and the bond stands as the single bond of the principal who is not obligor and obligee, and an action at law is maintainable against such principal.

It is true that, if the obligee make his obligor executor, the cause of action may be extinguished. So too, if a *feme* obligee marry the obligor, his legal obligation may be released by operation of law. And the same consequence will result from either of those acts by an obligee, although there may be other co-obligees and other co-obligors than the obligee and obligor immediately engaged in the act of extinguishment. For a release by one of several co-obligees, of one of several joint and several co-obligors will release the whole obligation; and any voluntary act of an obligee whereby an action on the obligation is destroyed or suspended is, by operation of law, equivalent to a formal and actual release.—Co. Lit. (264. b.) Com. Dig. Release (A. 2.) Ba. Ab. Release (B.) Chitty on Con. (296.) Wheaton's Selwyn (425.)

And the reason why, in such a case, an action can not be maintained on the obligation is that, after it was complete and in full force, the obligee or one of the obligees, by his or their voluntary act, extinguishing the cause of action against the obligor or one of the obligors, thereby, in effect, extinguished the whole legal obligation of the bond. But in this case, no act was done by any of the obligees after the execution of the bond for releasing any one of those who were legally bound: the obligation remains as it was *ab origine*. The sureties never incurred any legal obligation, because they were also obligees; and the same persons cannot be both obligors and obligees to each other in the same contract. But may not the bond be obligatory on the principal

who was not an obligee? Can the fact that the sureties were not legally bound to themselves affect the obligation of the principal to whom no such cause for invalidating his undertaking applies? May not the bond be considered as the legal obligation of the principal obligor without sureties? This, we think, is its legal effect. If the sureties had been *femes covert* or infants, and therefore, as to them the bond had been void or voidable, nevertheless the principal obligor might be bound and an action might be maintained against him. Why may not the principal be equally bound in this case?

DEBARD  
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The obligation of the principal could not be considered as released on the ground that co-obligors, by being also obligees, could release themselves or might be considered as released because they were both obligees and obligors; for never having been legally bound an attempt to release them would not operate as a release as to the principal. The bond should, therefore, in our opinion, be deemed legally binding on Henry Crow. Such seems to be its legal effect: and as such, a suit might be maintained on it as a common law obligation.

Execution upon sole bond in which sureties are co-obligors & co-obligees erroneous if it issue against all the parties it should only issue against the principal or such as are not both obligors and obligees.

But it is true that if it be not such a bond as will authorize an execution against all who signed it, the process is irregular at least, because the execution must conform to the judgment; and consequently, if the bond be in legal effect, as a judgment against only one, execution should have been issued against him alone, and then it could not have been quashed by proving that other persons signed it, because the same proof would have shewn that it is his obligation alone.

Besides it may at least be doubted whether the bond ever had imparted to it the legal effect and operation of a judgment or decree, so as to authorize execution upon it. It was given in consequence of a sale of the estate of infants made in pursuance of a decree for that purpose, and directing that when taken, the sale bond should have the effect of a judgment, or, in other words, that execution might be issued upon it.

Wherefore we cannot say that the circuit court erred in quashing the execution. But it certainly

Bond which is valid to any

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ex ent as a  
common law  
obligation  
should not be  
quashed.

The execut'n  
issued on sale  
bond should  
be quash'd for  
defect in bond  
yet if the bond  
be valid to a-  
ny extent and  
obligees satis-  
fied with it,  
erroneous to  
quash the  
bond on mo-  
tion of obligor

erred in quashing the bond. As it was not a statu-  
tory bond, the common law Judge had no right to  
quash it: and the chancellor having, by his final de-  
cree, as we infer, approved the bond and parted  
with his power over the case, had no right to quash  
it, unless it could be deemed to partake of the char-  
acter and to have the operation of a decree—and even  
then he ought not to have quashed it, because it was  
legally valid to some extent if not equitably so to its  
whole extent, and because the obligees were satisfied  
with it and opposed its quashal.

Wherefore the order quashing the execution is  
approved—but that quashing the bond is reversed  
at the cost of the defendant in error.

*Hanson*, for plaintiffs; *Clarke and Hockaday*, for  
defendants.

REPLEVIN.

## Dillon vs. Wright.

CASE 4.

Appeal from the Owen Circuit: THOMAS M. HICKEY, Judge.

*Replevin. When maintainable. Possession. Restitu-  
tion. Time. Statute of limitation.*

November 3. Chief Justice ROBERTSON, deliveren the opinion of the Court.

THIS is an action of replevin, which  
was once before in this court, and was remanded to  
the circuit court for further proceedings. (See IV.  
J. J. Marshall 354) On the return of the case  
to the circuit court, the defendant in error, amended  
his cognisance by averring that T. B. Dillon the  
defendant in the execution, was, when it was levied, in  
the possession of the male slave, holding him on hire  
for a term that had not then expired; and was, and  
had been, for more than five years, in the possession  
of the female slave, *claiming her as his own*. A de-  
murrer to the cognisance having been overruled,  
and the plaintiff having failed to reply, a judgment  
of *retorno habendo* was rendered.

The only question now presented is, whether or  
not the facts averred in the cognisance, are sufficient

to shew that the plaintiff had no right to maintain an action of replevin?

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vs  
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As to the male slave, if T. B. Dillon held him by a contract of hire, and the term had not expired, the plaintiff had no right to his action of replevin—1st. Because, if the plaintiff was the bailor, as he had not a right to immediate restitution, replevin in his name would not lie. 2d. If the slave had been hired of another person, not holding under the plaintiff. T. B. Dillon must have held him adversely to the plaintiff; and therefore this action is not maintainable. It is not material whether the slave was subject to the execution or not; because, even if he were not subject, the plaintiff cannot maintain replevin for him, unless he was in possession, or had a right to the possession of him at the date of the caption; for in order to maintain replevin, the taking must be illegal, and the party complaining, must, at that time, have been entitled to the immediate possession. 1 Chitty Pleading, on 159.

To maintain replevin, pl'tf must have had possession of the property, or the right to the possession at the time of the caption, and the taking must have been illegal.

As to the female slave, although the averments in the cognizance, may not shew necessarily, that she was subject to execution, they show that the plaintiff cannot maintain the action; because if, as alleged, T. B. Dillon was in the possession of her, claiming her as his own, that possession must be deemed adverse to the claim of the plaintiff; and therefore, he cannot maintain the action of replevin in his own name.

Replevin will not lie for taking property held adversely to plaintiff.

If the plaintiff be entitled to the slaves, or either of them, he might, if he shall have been injured by the levy or sale, obtain reparation in an appropriate action. Yet replevin is not that action, if the facts averred be true.

Wherefore the judgment is affirmed.  
Sanders for appellant.



TRAVERSE.

## Norton vs. Sanders.

Case 5.

Appeal from the Circuit Court; H. O. BROWN, Judge.

*Amendment. Clerical misprision. Estoppel. Parol evidence. Tenant. Forcible detainer.*

November 4. Chief Justice ROBERTSON, delivered the opinion of the Court.

On a traverse of an inquisition in the country a jury in the circuit court having found Norton, the traverser, guilty of the forcible detainer charged in the warrant, the court rendered judgment in favor of Ann T. Sanders, the traverser, and plaintiff in the warrant. But as the judgment certified on the order book, was only for costs and not in terms for restitution, this court dismissed an appeal prosecuted by Norton. See III. J. J. Mar. 396.

When the opinion of this court was certified to the circuit court, the traversor moved the court to amend the judgment by adding an express judgment for restitution; which, though opposed by the traverser, was accordingly done. And this appeal is prosecuted by Norton to reverse the judgment as thus amended.

The appellant denies the power of the circuit court to amend, as it did, the judgment—complains of error in the exclusion of evidence introduced by him, and in an instruction given to the jury on the trial.

If there be any thing to amend by, the circuit court may, at a subsequent term, so amend the record, as to effectuate an order or judgment, actually directed to be entered, at a former term but omitted or defectively done.

Whenever there is any thing to amend by, a court may, at a subsequent term, amend so as to effectuate, but not so as materially to alter or defeat a judgment which it actually gave at a preceeding term. In this case the verdict and the law shew what the judgment should have been and what the court must be presumed to have intended that it should be: and the minute book shews that the court directed the clerk to enter a judgment on the verdict—such a judgment of course, as the law required.

Judgment  
on traverse,

In such a case, such an amendment as that which was made, is allowable by the statutes of "amendment and *jeofail*" according to their practical construction. The omission to enter the judgment for restitution, must be deemed a clerical misprision which should be corrected, and not an error in the

court which would not be amendable. Bacon states an analagous case when he says, "In Ejectment, if the judgment is entered *quod querens recuperet*, the damages and costs, and not *quod recaperet terminum*, as the case is, this shall be amended."

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rendered in favor of plt'f. on a writ of forcible detainer, for costs, (judgment for restitution omitted,) circuit court may amend at subsequent term, by entering judgment for restitution.

The appellee having read on the trial, a writing signed and sealed by the appellant, acknowledging that Ann T. Sanders had been put in possession by a writ of restitution, and covenanting that he would hold the land as her tenant, and surrender it at a specified time:—he offered to prove that, by the parol contract, he had a right to keep possession a year beyond the time specified in the writing; but the court rejected the evidence as inadmissible: He then offered to prove that the sheriff did not, in fact, turn him out by the writ of restitution; but this evidence was also rejected as inadmissible, because it would contradict the return on the writ. The appellant does not seem to have been a party to the writ, and proved that he had, prior to the date of it, been in the possession of the land several years—had never been evicted by the appellee, and had not, directly or indirectly, obtained possession from her or under her title, but had continued to hold under his father, and adversely to her until the alleged eviction by the writ of restitution.

On the motion of the appellee the court excluded all the parol testimony, and instructed the jury that if they believed that the appellant executed the written acknowledgment, and refused to surrender the possession on demand, after the expiration of the time therein designatd, they must find for the appellee.

As the appellant is not shewn by the record to have been a party to the writ of restitution, the return upon it does not conclude him; but he is estopped by his covenant to deny any thing which he therein acknowledged, unless he could avoid the writing by proof of fraud in its execution or procurement; and no such fraud has been shewn, or, in a proper manner, attempted to be shewn.

The writing, as it is, must be also conclusive evidence as to the time when the possession was to be surrendered.

Person not estopped by return on a writ to which he is not a party, but is estopped by express acknowledgment in his covenant; unless it be shewn to have been procured by fraud.

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The circuit court did not therefore err in rejecting the proffered evidence as to the time of surrender.

Writ of forcible detainer is maintainable only when the occupant has entered under demandant in virtue of a lease.

A warrant for forcible detainer is maintainable only when the occupant obtained the possession from the demandant, and under a contract of lease. If the appellant was not party, or privy to the order to the writ of restitution, he might, after being evicted by it, have been reinstated by a warrant for a forcible entry.—*Chiles vs. Stephens* (1st Mal. 333;) and consequently, being still in possession, a warrant of forcible detainer should not be maintained against him, (if he be not concluded by the written lease) provided a jury should consider him, not as a tenant who obtained possession from his landlord, but as one who held possession independently of the nominal lease and agreed to hold as tenant merely to retain the possession, and thus frustrate an illegal attempt to oust him by force.

Party estopped from denying eviction if expressly acknowledged in covenant, to hold under title of *habere facias*. Unless fraud or duress, he cannot resist, restitution by proving the eviction to have been illegal.

If the covenant had expressly acknowledged that Norton had been, in fact, evicted by the sheriff under the *habere facias*, he would have been thereby estopped to deny that fact, and consequently, the eviction being admitted, and having been submitted to, by afterwards voluntarily leasing the land and entering under that lease, he could not, (without proof of fraud or duress,) resist restitution by proving that the eviction was unlawful and such as he might, on that ground alone, have avoided if he had sued out a warrant for forcible entry instead of waiving such right and entering under and recognising the title of the wrong-doer.

Written acknowledgment that party claiming as landlord, has been put in complete and perfect possession of the land by the sheriff, and that party charged as

But the covenant does not expressly acknowledge that Norton was actually evicted nor that he re-entered under the title of Miss Sanders. It merely admits that, in virtue of the *habere facias*, "*the sheriff has put Ann T. Sanders in complete and perfect possession of the land, &c. which I, Wm. Norton occupy; and in consequence of the said Ann T. Sanders being willing that I shall continue here on said land, &c.—I consider myself as her tenant, &c.*"

This acknowledgment does not necessarily import that Norton had been evicted from the land—it rather means that he was not, in fact, turned out, but that

Miss Sanders having been put into possession with him, he was *considered as constructively turned out*, and was to *continue* or retain his possession, but as her tenant. The testimony, therefore, which tended to prove that he had never been, in *fact*, evicted, and had, prior to the alleged eviction, held the land several years, as tenant under her father who claimed adversely to Ann T. Sanders, did not contradict the covenant but was admissible to show the truth which the covenant left in doubt. The evidence on that point, and which was excluded by the circuit court, tended to shew only an attornment; and an attornment by a tenant without his landlord's consent, or without a judgment, order or decree, is declared to be void.—Besides, in such a case, the tenant may resist a warrant by his new landlord for detainer, because he did not, in fact, enter under the title of that landlord.

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vs  
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tenant, "considers himself tenant of such landlord is not an acknowledgment of eviction; nor does it estop the occupant from contesting the right of such claimant of the land; and parol testimony admissible to prove no actual eviction, and the prior possession and its character.

The effect of the evidence rejected by the circuit court, will not now be considered. The jury had a right to consider it, and to decide on the whole case, whether Norton should be deemed the tenant of Sanders, and whether he *entered* as her tenant—and ought, under all the circumstances, to be concluded by his contract of lease, and compelled to make restitution.—Wherefore the circuit court erred in excluding evidence, and in instructing the jury, in effect, that they must find for Sanders.

Tenant may resist a warrant for forcible detainer at the instance of a landlord, under whose title he did not enter.

Judgment reversed and cause remanded for a new trial.

*Mills and Brown*, for appellant; *Sanders*, for appellee.

### DISSENT.

*Judge Underwood dissented to part of the foregoing opinion as follows:*

Judge Underwood is of opinion that Norton might avoid his covenant by shewing a tortious eviction in consequence of which he had, either to enter into the covenant, or forthwith abandon the premises. Such an abuse of the process of the law by Sanders, does, in his opinion, amount to a fraud in law, consequently he dissents from so much of the opinion as holds out the idea that Norton would

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be estopped by his covenant to deny his tenancy under such circumstances.

*The counsel for the appellee filed the following suggestions by way of petition for re-hearing, which were overruled:*

The counsel for the appellee would respectfully suggest to the court that, in the opinion delivered in this cause, it is reversed on the ground that the appellant, Norton, held under his father, John Norton, who held adversely to Sanders: The court is respectfully referred to the writ of restitution which will shew that John Norton was a party thereto and actually turned out by it, by a subsequent writ.—The place held by William Norton is part of the same tract held by John Norton,—and surely the tenant William cannot be regarded as in a better condition than his landlord. A reconsideration of the cause is respectfully prayed.

ASSUMPSIT.

## Greathouse vs. Throckmorton.

Case 6.

Error to the Mason Circuit; W. P. ROYER, Judge.

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*Indebitatus assumpsit. Money paid, lent, &c. Gambling. Consideration. Action.*

November 8. Judge BUCKNER, delivered the opinion of the Court.

THIS was an action of assumpsit, prosecuted in the circuit Court, by Throckmorton against Greathouse. The declaration contains two counts—1st for money lent; 2d for money paid, laid out, and expended, by the defendant in error, for Greathouse, at his instance and request.

The cause was tried upon the general issue; and upon a verdict rendered in favor of Throckmorton, for one hundred and fifty dollars, a judgment was entered; to reverse which, Greathouse prosecutes this writ of error.

One witness only was examined, who proved in substance, that he had opened a *faro bank* at the house

of Throckmorton, and won of Greathouse the sum of one hundred and thirty dollars, who left the place without paying him; but a few days afterwards returned, and informed him that he had spoken to Throckmorton to pay it for him, and enquired of witness whether he was willing to take him for the amount, and discharge him, (Greathouse.) The witness consented, and they spoke to Throckmorton on the subject, who agreed to the arrangement; and the plaintiff in error was thereupon discharged from the debt. The defendant in error, had not been engaged in the game, when the witness won the money from Greathouse; but was present during a part of the time that the parties engaged were gambling; and urged the plaintiff in error, to cease, and eventually succeeded in putting a stop to it.

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The witness owed Throckmorton, who was a tavern-keeper, \$20 for board, and \$130 for money won at a time, different from that at which the money had been won by the plaintiff in error; and in that way the \$150 which Throckmorton had assumed to pay for Greathouse, was adjusted, to the satisfaction of the witness, who stated that he considered the payment made to him, in the manner stated, equal to money, because he owed that sum to Throckmorton—no part of which had been won in the presence of Greathouse; and that he would have paid in money, every cent of the bill for board, and the \$130 won from him, had it not been adjusted in the manner stated.

Upon the close of the testimony, a motion was made to instruct the jury, as in case of nonsuit, which the court overruled.

The plaintiff in error, also moved the court, to instruct the jury, "that if they believed from the testimony, that one hundred and thirty dollars of the debt, due from Greathouse to Smedley, (who was the witness,) had been arranged and settled, by a debt due from Smedley to Throckmorton for gaming, the plaintiff could not recover that amount in this action;" but the motion was overruled, and to the opinions of the court, on both points, exceptions were taken, and their correctness is now questioned by the errors assigned.

GREAT-  
HOUSE  
vs.  
THROCKMOR-  
TON.

Assumpsit for money paid &c. only maintainable when the consideration is money, not property, and is supported when plaintiff pays a debt due by def't. to plaintiff's debtor, by cancellation of both debts, without the money actually passing and repassing.

For the plaintiff in error, it has been insisted that, under neither of the counts in the declaration, could a recovery be legally effected, as there was no money actually *lent* or *advanced*. Various authorities have been cited in argument, none of which are sufficient to maintain the position assumed. The doctrine that *indebitatus* assumpsit is in the nature of debt, and must be supported by a monied consideration, cannot be reasonably doubted. The case cited proves that; but nothing more. In the case of *Lucket vs. Bohannon*, III Bibb 378, which has been confidently relied upon by the counsel of Greathouse, this court said: "It is clear that an action for money had and received, or for money laid out and expended, cannot be maintained where no money has been received or paid; but immediately afterwards it is added, "and in this case, the evidence proves property and not money was received by Lucket." In the present case, no part of the consideration was property.

Had the money been advanced by Throckmorton to Greathouse, and by him paid to Smedley, and by the latter returned to Throckmorton, no difficulty on this point could have suggested itself. It would certainly have been an idle ceremony to have thus handed the money, from hand to hand, under an agreement between all the parties concerned, that it should be immediately returned to the pocket of the individual, from whom it started. The case of *Beardsley vs. Root*, XI Johnson's Reports 470, is considered as in point. That was an action instituted by a client against his attorney. On a sale of land, made by the officer under an execution in favor of the client, his attorney became the purchaser, by whose directions the officer returned the execution satisfied, having first taken from him a receipt for the amount of it. The court in their opinion, said, that strictly speaking, the attorney should have paid to the sheriff the purchase money, in satisfaction of the execution; but as the officer would have been justifiable in paying it back, it was unnecessary to go through such a ceremony; and that upon the return of the execution satisfied, by order of the attorney, and the reception by him of a deed for the land, the amount of the execution, was in contem-

plation of law, in his hands. The action in that case was for money had and received; in this, it is for money lent, laid out, and expended, &c. That however, cannot vary the principle. In neither case could the action be maintained, but upon a mo-  
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 nied consideration; and an actual advancement of money, would have been as necessary in the one case as the other.

We are, therefore of opinion, that the motion to instruct as in case of non-suit, was properly overruled.

As to the second instruction moved for, we are of opinion, that it was also properly refused. Great-  
No answer to  
action for mo-  
ney paid by  
plaintiff to  
defendant's  
use, that plt'f  
had won the  
money from  
the person  
paid. The  
responsibility  
of defendant  
grows out of  
his being dis-  
charged from  
his debt by  
plaintiff, and  
at his request.  
 house was under no obligations, legal or moral, to pay the money which Smedley had won of him; but if he thought proper to do so, no one had a right to object to it. He determined to do it, and applied to Throckmorton to advance for him the money, by paying it to Smedley, or settling the demand for him. Throckmorton was not even present when the money was won from Greathouse, except for a part of the time. He was not in any way concerned in the game, and used his influence to prevent him from gambling; and when applied to, as a friend to pay the money for him, procured his discharge by receipting to Smedley, for \$150, due by him;—130 was, to be sure, won at faro; but it was a matter of no consequence to Greathouse, how Throckmorton settled the debt. He had no right to object to the manner of payment. If the defendant in error had paid the money to Smedley, the latter owed it to him, and would have immediately returned it, if he is worthy of credit.

The judgment of the circuit court, must, therefore, be affirmed with costs.

### DISSENT.

*Judge Underwood delivered the following dissent to so much of the opinion of the court, as relates to the second instruction, moved by defendant and overruled.*

In this case I dissent from so much of the opinion heretofore delivered, as sustains the circuit court in refusing the second instruction asked for by the plaintiff in error. The act against gaming (1 Dist. 633) makes void all promises where the whole or



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any part of the consideration of such promise is money or other valuable thing won, laid, or betted at cards, dice, tables or any other game whatsoever.— Under the operation of this act, the undertakings on the part of Greathouse to pay Smedly, and of Smedly to pay Throckmorton the sums which each had won at Faro, were also hereby void. But by transferring the void promise of Greathouse in favor of Smedly to Throckmorton, a binding efficacy has been imparted to it, and the latter will, as the opinion stands, be permitted to recover upon it. I confess that I do not perceive the principle upon which it can be done with propriety. On the contrary, where the transfer rests upon no other consideration than that of exchanging one gaming debt for another, I cannot conceive how a liability can be created according to any known principle of the law. There is no consideration for such a liability. Here Throckmorton has given a gaming debt on Smedly for a gaming debt on Greathouse. True Throckmorton also gave an account for Smedly's bond amounting to \$20 in addition; and to this extent there was a valuable consideration parted with by him, provided Smedly was discharged because of the assumpsit. Even if Throckmorton has a right to recover to the extent of this \$20, still a valuable consideration of that amount cannot enlarge his right to recover for a gaming consideration. I should rather say, that the gaming consideration when coupled with a valuable consideration, will vitiate the latter, than that the latter will purify the former.

I hold it to be incontestable that every declaration in assumpsit, must set out a consideration sufficient in law to support the action. See 1 Chitty 295.

Now I think there can be no such thing as a valuable consideration to support a contract, unless one of the parties to it, either transfers money or property at the time, or agrees to do so in future, or has already done it; or engages to perform or has performed some labor or service; or agrees to do or abstain from doing some act, the performance of which is lawful; or releases some right or privilege which may be lawfully enforced or executed. I do

not know that there is any other class of cases than those named, where a valuable consideration for a promise, either express or implied, can be found.— In the action of assumpsit it is a maxim that the plaintiff cannot recover more than *ex equo et bono* he shews himself entitled to. He must make out his right to recover, by stating and proving a consideration. In this case Throckmorton has obtained a judgment for \$130 which *ex equo et bono* he is not entitled to, and as I think without consideration: he has parted with no money or property and is not bound to part with any; he rendered no service and is not bound to perform any; he has made no agreement to do or not to do an act which was lawful and which agreement on his part might have been a sufficient consideration to support the promise on the part of Greathouse; and he has released no right which he could have enforced by law. On the contrary, he has merely surrendered a claim to a gaming debt denounced by the statute, and which he could not recover in a court of justice. It therefore seems to me analogous to those cases where the fountain is corrupt and where nothing but immorality can issue from it.

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If the doctrine is once established that gamblers by swoping or exchanging debts, can cleanse the turpitude or illegality of the consideration, there are but few of them, who will lack ingenuity to secure their winnings, by inducing their victims to promise payment to some compeer in guilt; or to one who has either really or pretendedly won of him at a different sitting. Thus the whole policy of the statute will be defeated by circumvention, and that excellent maxim of the common law, "*ex turpi contractu oritur non actio*," disregarded.

If A promises to pay B \$50 for stealing a horse for him, and B promises to pay C \$50 to furnish the stolen horse, and C steals the horse for B who delivers the horse to A and then it is agreed between the parties, with a full knowledge of all the facts, that A shall pay C the \$50 and B be released from C and have no further claim on A, can C recover from A upon the promise? It does run counter to all my notions of the pure principles of the common

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Dissent.

law, to think that they would countenance the claim of a thief and secure to him the reward of his iniquity under such circumstances. The demand of Throckmorton against Greathouse is precisely analogous to that of C against A in the case supposed. The only difference between the two cases is, that one relates to the conduct of thieves, the other to the conduct of gamblers. The common law applies to the immoral conduct of the one, and the statute operates upon the illegal contracts of the other class.

If Smedly chooses, he can still pay Throckmorton, notwithstanding Greathouse's conduct. If Greathouse has violated the rules deemed honorable among gamblers, I see no reason why Smedly should shelter himself behind Greathouse. But I disclaim the doctrine that a valuable consideration can in any case turn upon the honor of a gentleman.

The opinion proceeds upon the ground that Greathouse had determined to pay the debt, although he was neither legally nor equitably bound; and that it was therefore, a matter of no consequence how Throckmorton settled it. The opinion here assumes, I think, too much. Greathouse seems to be determined not to pay the debt, if we may judge from his resistance here. That he made promises to Throckmorton is admitted, but the very question is, whether the promises so made are binding; and not whether these promises were made at the time with a determination to perform them or to discharge the debt to Smedly. These promises were not obligatory on Greathouse when made, because he received and was to receive no consideration. If by them he had induced Throckmorton to advance in money or property, or any thing valuable, the amount of the gaining debt due Smedly, then, I admit that when Throckmorton so made the advance, it would have imposed a liability on Greathouse to remunerate him to the extent of the advancement; because to that extent Throckmorton would otherwise sustain a loss, which constitutes as valid a consideration in law, as a gain. But here, in reference to the \$130, Throckmorton has made no advance for Greathouse. He has paid for him neither money nor property, nor a *chose* in action. He has

only surrendered a gaming debt which in law is no-  
 thing, because the contract by which it exists, if it  
 can exist at all, is void. Hence Throckmorton has  
 not lent, or laid out and expended money for the  
 use of Greathouse to the extent of the \$130, and for  
 so much therefore he had no right to recover.

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 ———  
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But it might be infered from the expression in the  
 opinion, that "it was a matter of no consequence to  
 Greathouse how Throckmorton settled the debt,"  
 that Greathouse could not take advantage of the  
 turpitude or illegality of the consideration. Such  
 an inference seems to me to run counter to the rule  
 which permits the defendant in assumpsit under the  
 general issue to shew any thing by which the plain-  
 tiff's right to recover may be defeated or restricted.  
 Some countenance is given to the opinion that Great-  
 house cannot go into the entire want of considera-  
 tion between Throckmorton and Smedly from a  
 note in Chitty on contracts, 184. The text says  
 that Buller justice put this case: "Suppose A owes  
 B 100£, and B owes C 100£, and the three meet,  
 and it is agreed between them that A shall pay C  
 the 100£; B's debt is extinguished and C may re-  
 cover that sum against A." There is a note made  
 in reference to this text to this effect: "It seems  
 that in such case the defendant cannot object want  
 of consideration between plaintiff and his debtor,"  
 and XII. East. 513, 515 is referred to in support of  
 the principle given in the note. I have examined  
 the case in East, and instead of its being against en-  
 quiring into the consideration, it rather favors it.—  
 Lord Ellenborough said, "If one agree to receive  
 money for the use of another upon consideration ex-  
 ecuted, however frivolous or void the consideration  
 might have been, in respect to the person paying  
 the money, if indeed it were not absolutely immoral  
 or illegal, the person so receiving it cannot be  
 permitted to gainsay his having received it for the  
 use of that other." Here the money having been  
 actually paid, the holder cannot retain it, but must  
 account for it to him for whose use it was paid, no  
 matter how frivolous the consideration may be, or  
 indeed whether there be any consideration at all.—  
 But if the consideration be immoral or illegal, what  
 then? Shall the plaintiff who has been engaged in

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the immorality or illegality of the transaction come into a court of justice and recover the money as a reward for his guilt or misconduct? I think not.—The case in East is long since the Revolution, and is not authority, even if it supported the doctrine contended for.

I have not considered it a matter of importance to enquire what effect the \$20 for Smedly's bond ought to have upon the case. I doubt whether it can authorise a recovery upon counts for money lent or laid out.

Speaking of the case put by Buller, Justice, as above, it is laid down in Chitty on Contracts 184, that, "if the defendant was not originally indebted to the third party, (B,) as for money had and received, the plaintiff's remedy is, it seems, only by action of special assumpsit on the agreement"—an amount for board may be distinguished from money lent, or laid out and expended. Whether this \$20 can sustain the action for any part of the demand set up by Throckmorton, I give no opinion, differing as I do from my brethren in the main point.

*The counsel for plaintiff in error filed the following petition for re-hearing.*

It is believed, by the counsel for Greathouse, that a re-examination of this cause, upon some questions not agitated in the opinion heretofore delivered, must result in a reversal of the judgment of the court below.

The record shews that, in July or August, 1826, Throckmorton kept a tavern at the Lower Blue Licks; that Greathouse called at his tavern as a guest, where he met with Smedly, who was at that time boarding with Throckmorton; that Greathouse and Smedly played at Faro until Smedly won from him \$150; that Smedly was, at that time, indebted to Throckmorton in the like sum of \$150, of which \$20 were for boarding and \$130 for money previously won from him by Throckmorton at Faro; that it was agreed among the three, that Throckmorton should give Smedley credit on his books, which he did, for the \$150; that Smedly thus owed Throckmorton, in consideration of the \$150,

which Smedly had won from Greathouse, and that Throckmorton should look to Greathouse for the money; or in other words, Greathouse verbally assumed to pay Throckmorton the boarding and gambling debt of Smedly, in consideration of the gambling debt which he owed Smedly.

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This promise of Greathouse is clearly within the statute of frauds and perjuries, and therefore null and void. The case of Waggoner vs. The Bells, IV. Monroe 7, is, on this point, decisive of the case.

Herbert G. Waggoner applied to Alexander Waggoner to borrow money, who, not having it to lend, procured various sums from the Bells, in his own name, amounting in the whole to about \$2500, which he paid over to Herbert G. Waggoner.— This money, except about \$100, was repaid, at different times, to the Bells, by Herbert G. Waggoner, who contended that he had paid the whole amount. The matter was referred to arbitrators, and Herbert G. Waggoner, agreed to pay the Bells the balance if the arbitrators should award it against him.— This court decided that his promise was void, because it was not in writing. They say that Alexander Waggoner had not been released from the demand by the Bells; that he was therefore still bound to them for the debt, and that, *without such release*, Herbert G. Waggoner could not be made responsible upon his verbal assumpsit.

In this case, no release was executed by Throckmorton to Smedly, or by Smedly to Greathouse.— Every thing was *verbal*, except the entering of a credit to Smedly on the books of Throckmorton. Should this be construed into a *release*, it would render the statute of frauds and perjuries a dead letter. In ninety-nine cases out of one hundred in the mercantile world, the original debtor obtains a credit for the demand, and the person who assumes to pay it, is charged with the amount.

But again; It is contrary to the policy of the statute against gaming, to permit any arrangement for the payment of a debt, with a person *who knew* of its vicious origin, to be the basis of its recovery in a court of justice. See, on this subject, *Hussey vs.*

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Jacob, I Salkeld 344, Carthew 356, Holt 528, and I Lord Raymond 87. See also, Bowyer vs. Bampton, II Strange 1155; and what Lord Mansfield says in Lowe vs. Waller, Dougless 744. See also, Thompson vs. Moore, IV. Mon. 79, 80; I do. 114, 15; I Dallas 429; IV. do. 298; V. Johnson's Rep. 327, 335; III. Cranch 242, 248; and I Binney's Rep. 110, 123.

The authorities first above cited shew that a person who is privy to the illegal and vicious consideration, can never recover a gaming debt. The others go a step farther, and establish the doctrine, that the *taint or vice*, of a gaming debt, follows it into the hands of an *assignee for a valuable consideration*, although he was *ignorant of the turpitude of the consideration*.

The only exception to this doctrine will be found in the case of Chiles vs. Coleman, II. Marshall 300. That if the *looser of money won at gaming*, in consideration of a *just debt*, which the *winner owes to a third person*, gives his bond to such third person, who is *ignorant of the turpitude of the consideration*, it will be obligatory. If however, such third person *understands the true nature of the demand*, the *new bond* will receive the *taint of the original transaction*, and will be null and void.

This view of the subject, might render it unnecessary to disturb the ground on which this court has predicated its opinion. But it is respectfully suggested, that it is not tenable, either by the decisions of the English courts, previous to 1776; those of our own state, or even those of New York.

Lord Mansfield, who was one of the most *liberal*, as well as enlightened judges, who ever sat in Westminster Hall, and who made *justice* his polar star, to guide him through the mazes of technicality, recognized the doctrine advocated by the counsel for Greathouse, as late as 1770, in the case of Nightingale vs. Devisene, V Bur. 2592. This was an action for money had and received. It was in proof, that £500, in East India stock, had been transferred to the defendant, for the use of the plaintiff. His Lordship, in delivering the opinion of the court of King's Bench, in this case, said: "We are all of opinion that this action, 'for money had and received, to the

use of the plaintiff,' will *not* lie in the present case, where *no money was received.*"

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In the case of *Locket vs. Bohannon, III Bibb, 378*, which was assumpsit for money had and received, and money paid for defendant, this court says: It is clear, an action for money had and received, or for money laid out and expended, cannot be maintained, where *no money has been received or paid.*

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In the case of *Cumming and Cumming vs. Hackley and Fisher, VIII Johnson 202*, which was an action of assumpsit for money paid by the plaintiff for the defendants, the supreme court of New York say: "But is such a change of security the *actual payment of money* under this count?" "In *Taylor and Higgins, III East, 169*, "the court of King's Bench, held "it not to be equivalent to the payment of money, "and not sufficient to entitle the party to recover "under such count. *It seems to be a rule, that under "a count for money paid, it must appear that money was "actually advanced.*"

This case was decided after solemn argument, by eminent counsel, and upon a review of the English cases on the subject, both before and since 1776.

Being *for money paid by a change of securities*, it is believed to be more in point, than the case of *Beardsley and Root*, referred to in the opinion of this court.

No English case, either ancient or modern, has gone the length of *Beardsley and Root*. Some modern cases have decided, that this species of action could be maintained, where bank bills or bills of exchange, had been received; but it was on the ground that they were *money*, and consequently that *money had been actually received.*

The case of *Beardsley and Root* is, however, clearly distinguishable from the case of *Greathouse and Throckmorton*, as well as from those of *Locket* and *Bohannon*, and *Hackley and Fisher*. It was a case of money had and received, *by an attorney for the use of his client*, and not for money lent or paid. The attorney had caused an execution, in favor of his client, to be levied on a tract of land; had become the purchaser of the land under the execution; had



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received a deed for the land from the sheriff; had given him a receipt for the amount of the execution, and directed him to return it satisfied, which he accordingly did. A stronger case for the maintainance of an action for money had and received, where the dollars had not been actually counted out and paid, can scarcely be imagined. But it has very little similitude to that now before the court, and should not be sufficient to overturn the doctrine of the common law, as recognized by Lord Mansfield, by this court, and the supreme court of New York, in the case above cited. A re-hearing is therefore respectfully solicited.

*Depew for Greathouse.*

### RESPONSE.

*Chief Justice Robertson delivered the Response of the court to the plaintiff's petition for a re-hearing.*

ON a full reconsideration of this case, the court, (Judge Underwood dissenting,) adheres to the opinion heretofore delivered.

Statutes a-  
gainst gam-  
ing to be con-  
strued strictly

The authorities cited in the petition, are not, in our opinion, applicable to this case; nor at all decisive of the principle which must govern it. We cannot think that any of the statutes against gaming, can be made available to the plaintiff in error.—These statutes have hitherto been, and should ever be construed strictly; such was the judicial interpretations of the Statutes of Charles II. and of Anne, in England—See II Burrow, 1027—II Wils. 309—Ib. 36—Cowper, 281. And the statutes of Virginia and of this state have never been constructively extended beyond their direct and obvious import.—The simple act of gaining or of betting, without fraud or deceit, is not, and never was unlawful.—As to promises on consideration of money or other thing won, the statutes apply only to promises “to any person or for his use,” in consideration of money or property, “by him won, or whereof money or other thing so won, lent, or advanced, shall be a part or all of the consideration money.” *Chiles vs. Coleman*, II Mars’l. 300. The assignment by the plaintiff to Smedly could not have been enforced as between themselves—nor could any action have been

A owes B  
money won  
at faro, B  
owes C, A ap-

maintained by Smedley against the plaintiff on any new contract made in consideration of that assumpsit—as long as the promise remained unsatisfied by payment, the promisor could not be bound by it. But, if in consideration of a debt due from Smedley to a stranger, the plaintiff had undertaken to pay the latter the amount which had been assumed to Smedley, he could not have exonerated himself by impeaching the original consideration, unless the stranger had been, in some way, privy to the gaming prior to the undertaking to him. So too there can be no doubt that if, at the plaintiff's request, the defendant had paid to Smedley in money, the amount won by him from the plaintiff, the defendant could recover it from the plaintiff in an action of assumpsit; for though there was no binding consideration between the plaintiff and Smedley, the payment of the money by the defendant at the plaintiff's request would have been, as between them, a legal and valuable consideration. (11 Wils. 309.) And for a like reason, if A owe B, and C, at the request of A discharge the debt or exonerate him from it, the consideration between C and B is immaterial—it is not even essential that there should have been any valuable or legal consideration as between them—and therefore C might recover the full amount of the debt from A even if the debt from A to B had been extinguished by a donation of it by B to C after the latter had assumed to pay it for A. In such a case the extinguishment of the debt by C at the request of A would be, as between them, a sufficient consideration to bind A to C for the whole amount of the debt so extinguished: Chitty on contracts, 184.

But the counsel for the plaintiff insists that, as his client had incurred no legal obligation to Smedley, he is not legally liable to the defendant in consequence of his extinguishment of Smedley's demand, so far as that extinguishment resulted from a gaming consideration between the defendant and Smedley. This would be true if the promise by Smedley to the defendant could be decided to be of no actual value. But we cannot judicially decide that Smedley's assumpsit to the defendant was of no value in fact. If Smedley was solvent and determined to pay the

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plies to C to pay B, which C does by discharging B from the same sum due to C from B, which A owed B, C owes A for money paid, &c. it is no defence to allege the consideration between A & B, and B and C to have been money won at *faro*. The consideration upon which C founds his action, is the surrender of his claim upon B, and his discharge of A's debt to B, at the instance and request of A.

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defendant, notwithstanding his *legal right* to have sheltered himself under the gaming law, his assumption to the defendant might have been equal in value to the amount assumed.

It is enough for the plaintiff that he may plead law against gaming for himself. He cannot plead it for another—nor prevent Smedly from paying—nor divest the defendant of the amount after Smedly had paid it.

Although Smedly was under no legal obligation to pay the defendant, yet he may have felt constrained by an honorary obligation even more inviolable (in the opinions of some men) than any mere legal sanction. And if he was willing and able to pay, and would have felt himself degraded by refusing to pay; surely it cannot be said that the defendant has sustained no loss in consequence of his having exonerated the plaintiff at his instance and request. He has given up a claim, which to him, may have been valuable and available—and shall the plaintiff now be allowed to withhold indemnity by shewing that Smedly might, if he had been so disposed, have evaded payment to the defendant by relying on a gaming consideration?

Such a doctrine would, in our opinion, be not only an unwarrantable extension, but an unjust and impolitic perversion of the statutes against gaming. It would produce extensive consequences, the end and operation of which can scarcely be imagined, and which might be embarrassing, mischievous and even demoralising.

Suppose that the plaintiff had bought the defendant's claim on Smedly, and had given his bond for the amount promised for it, (knowing the original consideration,) could he have avoided the obligation of his bond by shewing that the defendant had won from Smedly the amount of the claim so sold? We think not.

The claim was deemed to be of some value—the parties fixed its value by their own estimate; and the plaintiff could not have evaded his bond given in consideration of the transference to him of the chance of collecting the amount of the claim. If

he had collected the amount, then surely he could not have avoided his bond. But the receipt of the amount after the execution of the bond, could not retroact so as to form a consideration for the bond, if there was no consideration at the date of delivery. Therefore, it would seem that the collection of the amount of the claim would not be material to the question of consideration—and whether the money had ever been collected or not, there would have been, as between the parties to the bond, a sufficient consideration.

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Suppose, when usurious contracts were void, A, who held a bond on B for \$1000 in consideration of that sum, loaned at an interest of 7 per cent, had sold the bond to C for the note of C to him for \$1000—(C having notice of the usury,)—could C avoid the note by shewing that the contract between A and B was usurious? It seems to us that he could not. If C had promised to pay B \$1000 in consideration of so much money won, and A at the request of C, had paid B the \$1000 for C by surrendering to B his bond for \$1000, given in consideration of the loan, could C avoid the payment of the \$1000 to A by shewing that the contract between A and B was usurious? It seems to us that he could not. B might not have ever pleaded the usury—his bond might, therefore, and doubtless would have been deemed valuable to A and the latter should not be juggled out of that value by C in consequence of kindness manifested towards him, and benefit conferred on him at his request. The analogy between a contract void for usury and an agreement void for gaming is perfect. Consequently, we come to the conclusion, that it is not material to the plaintiff nor to the legal merits of this case whether Smedly could or could not have resisted the payment of the sum which he had assumed to pay to the defendant. He chose to pay it—and, as is suggested in the former opinion, the defendant's right to recover the whole amount in this suit, is as perfect and as legal as it would have been if Smedly had paid the defendant with one hand and then received the amount with the other hand in consequence of the defendant's assumpsit to the

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plaintiff. If the defendant and Smedley had merely exchanged their claims, the one for the other, without extinguishing Smedley's claim on the plaintiff, the latter might have successfully relied on the original consideration in a suit on his promise to Smedley.— But he is not sued on that promise but on that to the plaintiff. Wherefore the former opinion must remain unaltered.

Debt.

### Bohannon vs. Broadwell.

Case 7. Appeal from the Woodford Circuit; W. L. KELLY, Judge.

*Practice. Nul tiel record. Demurrer.*

November 8. Chief Justice ROBERTSON, delivered the opinion of the Court.

THIS is an action of debt, brought by the defendant against the plaintiff in error, on an appeal bond. The declaration averred that the decree appealed from, had been affirmed. The circuit court, after overruling a demurrer to the declaration, sustained a demurrer to a plea of *nul tiel record*; and thereupon judgment was rendered for damages assessed on a writ of enquiry.

The plea is good. It is, in effect, a denial of the allegation of affirmance; for if there be no record of affirmance, the decree could not have been affirmed. It is not material, therefore whether *nul tiel record*, or a plea simply denying that the decree had been affirmed, would have been most formal: In this case they would be the same in effect.

But *nul tiel record* was the most appropriate plea. The technical mode of declaring would have been, to aver that the decree had been affirmed, "*as appears by the record.*" But simply averring that the decree had been affirmed is, in substance, equivalent to the more technical averment. If the averment had added, "*proul palet per recordum,*" it would certainly have been proper to plead that there was no such record; for, whenever a declaration avers that a material fact appears by a record, the proper plea is *nul tiel record*; and consequently, as the decla-

*Nul tiel record*, a good plea to an action of debt, on an appeal bond, altho' the declaration merely avers the affirmance of the original judgment or decree, without concluding *proul palet per recordum*.

ration can be sustained only on the ground that the averment that the decree had been affirmed, implies that there was a record of the affirmance, the plea of *multiel record*, was not only in substance and effect, but in form also, the proper plea. And surely, if it be true, there is no cause of action. The circuit court, therefore, erred in sustaining the demurrer to the plea. Wherefore the judgment is reversed, and the case remanded with instructions to overrule the demurrer to the plea.

*Haggin* for appellant, *Payne* for appellee.

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## Turpin vs. Turpin.

CHANCERY.

Appeal from the Garrard Circuit; J. L. BRIDGES, Judge. CASE 8.

*Commonwealth bank paper. Usury. Set off. Chancery practice. Parties.*

Judge BUCKNER, delivered the opinion of the Court.

November 8.

ON a note, bearing date the 25th day of December, 1823, by James Turpin, to his father, Hezekiah Turpin, for 373 dollars, payable one day after date; the latter sued and recovered judgment. To be relieved against it, James Turpin filed his bill in chancery, in August 1828, alleging that the note on which the judgment had been rendered, was drawn by mistake for dollars, when it should have been made payable in notes on the bank of the Commonwealth; and that his father was endeavoring to coerce payment of the judgment, in notes of that bank, although they had greatly appreciated, since the note sued on became due; which he charges to be an usurious exaction.

The defendant answered the bill denying the equity relied on.

By an amended bill, the complainant alleges, that his maternal grand father, Francis Cheatham, published his last will and testament in 1785, in the state of Virginia; which, after the death of said Francis, was duly admitted to record in that state, during the year aforesaid; by which he made the

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following devise to Jane Turpin, (mother of complainant.) "I leave to my daughter, Jane Turpin, during her natural life, three negroes following, to-wit: Jeffrey and Lydia, and their increase, with their former increase; and whatever else I have given her; and, at her death, to be equally divided among her children;" that his mother had died in November 1823, leaving, besides himself, the following children: William, Daniel, Thomas, and Frances. He alleges, that previous to the death of his mother, Hezekiah Turpin sold the aforesaid slaves with their increase; but that he had not been enabled to ascertain where they were, and that he had also sold some other slaves, embraced by the expression, "and whatever else I have given her;" in the bills of sales, for which last, he, with his brothers and sister, had joined his father, upon his promise to make to them a proper compensation; that his father had accordingly sold the whole of his property, shortly after the death of his (complainant's) mother, except such of his slaves as had not been sold, which he had divided amongst his children, including complainant; and proposed to advance to each child, an equal portion of the money arising from the sale, reserving to himself, for his support, interest on the sums advanced. To which proposition he, complainant, acceded. Whereupon his father made the proposed advancement to him, in notes on the bank of the Commonwealth, then greatly depreciated, which he accepted as a loan, and executed his note for the amount; that he annually paid the interest for several years, renewing his note, until 1826; when he executed that on which the judgment had been recovered, it being in consideration of the loan aforesaid; and for \$26 in Commonwealth's bank notes, due by him for property purchased at the sale aforesaid.

He insists, as in his original bill, that to compel him to pay more than the value of the bank notes at the time they were advanced, (which he says was in 1823,) with interest thereon, would be an exaction of usury. He makes his brothers and sister defendants, and prays that his father be compelled to state how many slaves he had received, under the will of Francis Cheatham, and at what price he had sold

them; that he be held responsible to him and his brothers and sister, for the respective portions thereof, to which each was entitled; and that a decree be rendered in his favor, for such sum as might be due to him, after deducting the amount justly due on the judgment.

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The brothers and sister answered, stating their ignorance of the claim set up, as growing out of the will of their grandfather; and expressing their willingness, that their father should dispose of his property, as he thought proper.

Hezekiah answered also, denying the claim founded on Cheatham's will; insisting that the slaves mentioned in the bill, as having been devised to him, by that will, had been given to his deceased wife, by Cheatham, her father, as far back as 1773. He admits, however, that he had sold them for \$1450; and that under a residuary clause in Cheatham's will, directing the whole of his property not specially devised, to be divided equally amongst all his children, he had obtained three slaves, one of whom was the mother and grandmother of all the slaves which he owned, at the death of his wife, and which he had not given, but lent to his children.

As to the manner in which the note sued on was executed, and the consideration on which it is founded, he refers to the statements of his answer to the original bill, in which he says, that the sale of his property was made "for dollars;" and that the notes were drawn accordingly, with a condition, that they might be discharged, by the payment of Commonwealth's paper; that a man by the name of Marksberry, bought a part of it, who, by his, defendant's directions, paid a part of the amount due for his purchases to the complainant, in Commonwealth's bank paper; which, with the sum due by complainant for property, which he purchased at the sale, constituted the consideration on which the note was founded, on which he had recovered the judgment enjoined. He says that the complainant was present when this note was drawn; directed how it should be written, and executed it, with a full knowledge of its contents, and with a knowledge "that he was on the same footing with other purchasers." He



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moreover insists, that at the time he obtained judgment, he agreed to accept paper of the bank of the Commonwealth, in discharge of it, which the defendant agreed to pay; and upon that agreement, permitted the judgment to be entered.

Upon a final hearing of the cause, the circuit court dismissed both bills, and dissolved the injunction which had been obtained with costs.

From the decree the complainant has appealed.

In the original bill, the two grounds relied on, are usury and mistake. Considering the proof in the cause, as well as the allegations of the appellant's bill, we are of opinion, that he was not entitled to relief upon either ground. A witness who was present at the execution of the note, on which the judgment was rendered, says that he wrote it according to the directions of both parties, and read it to them. There is no circumstance proved, from which it can reasonably be inferred, that the appellant did not understand the manner in which the note was drawn, when he executed it; and it is not pretended that any fraud was practised in procuring it. There is no doubt that the consideration on which it was founded, was a debt due in notes, on the bank of the Commonwealth; and notes on that bank advanced to him by the appellee. From the proof it is very probable, that the appellee did not intend, at the time, to coerce payment of any part of the principal, although he reserved to himself the right of doing so, if he chose; and that he was induced to depart from his original determination on that subject, by what he considered as undutiful conduct towards him, on the part of his son; and from that circumstance, it may be presumed that neither party was particularly attentive, as to the manner in which the note was worded. But be that as it may, the appellee has not attempted to take any advantage of the appellant, from the notes calling for dollars instead of bank notes. Had it been drawn, as the appellant says it should have been, he might have been compelled to pay the amount in Commonwealth's bank notes, with interest; for he does not deny, indeed he acknowledges, that by the contract, as verbally made, he was bound to pay interest.—

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The judgment was not and could not be regularly entered for bank notes; but it was for the proper amount, with an endorsement that bank notes would be received in discharge of it; an endorsement made evidently, with the intent of exacting nothing more than justice; and no attempt has been made to depart from that determination. This view of the case, is satisfactory to shew, that the ground of usury cannot be supported. The appellant does not even allege that the appellee required, or that he consented to pay an usurious interest on the sum lent. He only insists that to exact more than the value of the bank notes with interest, would be usurious; a conclusion entirely unwarranted, if even a contract could be deemed usurious, by matter subsequent to its creation, which was not so originally; a position which cannot be admitted, for he acknowledges that he received bank paper, and was by contract bound to return it with interest. He has, therefore, no right to complain, as nothing more has been demanded of him. It would be unjust and absurd to convict the appellee of usury, merely because the note was taken for dollars; when it is clear, that neither party understood that any usury was to be paid, and when none has been claimed.

On contract to pay Commonwealth's paper and interest thereon, it is not usury to exact the Commonwealth's paper and interest notwithstanding the paper has appreciated since date of the contract.

The only relief that he could claim, according to the principles of equity, is a specific execution of the contract. But that he is endeavoring to avoid; and the chancellor cannot aid him in such an attempt. See the case of Taylor's administrators vs. Reed, V. Monroe, 36.

Chancellor will not set off unconnected demands, unless there exist extraneous circumstances which render it equitable to do so.

As to the claim for the price of the slaves sold, as exhibited in the amended bill, we shall not enter into an investigation of it, as it is improperly combined with the matters of the original bill. Between it and the consideration of the note, there is not the slightest connection; and no extraneous circumstance is relied on, which can authorize the court to entertain jurisdiction of it, on the ground of set off; and if, on that ground, it cannot be sustained, there is no other. Confusion should be avoided in conducting chancery, as well as common law suits.

In the case of Richardson, &c. vs. McKinson, &c. Littell's select cases, 322, it is laid down as a settled

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neither to permit several complainants to demand, by one bill, several matters perfectly distinct and unconnected, against one defendant, nor one complainant to demand several matters of distinct natures against several defendants.

rule, neither to permit several complainants to demand, by one bill, several matters, perfectly distinct and unconnected, against one defendant; nor one complainant to demand several matters of distinct natures, against several defendants. In Maddox's Chan. II vol. 176, it is said, "a bill containing things of distinct natures, brought against two or more persons, is demurrable;" in support of which, 1 Atk., 148, is cited. Again in same author, 293, "If a bill be brought concerning things of distinct natures, against several persons, or against one, it is demurrable; but not if combination is charged, unless it be denied by the answer," &c. A reason is assigned, that if the court were to allow a plaintiff to demand by one bill, several matters of different natures, against several defendants, it would tend to load each defendant with unnecessary burthen of costs, by swelling the pleadings with the state of the several claims of the other defendants, with which he has no connexion. This is certainly one, but not the only reason; to prevent confusion, and preserve simplicity in the pleadings, must be regarded as a matter of importance; and should, in no case, be unnecessarily overlooked. But it was erroneous to dismiss the amended bill absolutely, as that might be a bar to a prosecution of the claim, in another suit, in which it may be investigated on its merits. The decree as to that, must be reversed.

The decree dismissing the original bill is correct, and must be affirmed.

*Owsley and Anderson* for appellant; *Mills and Brown* for appellees.

*Absent*, Chief Justice Robertson.

CHANCERY.

## Kay vs. Jones.

Case 9.

Appeal from the Warren Circuit; BRODNAX Judge.

*Dower. Conveyance, certificate of.*

November 9.

Chief Justice ROBERTSON, delivered the opinion of the Court.

THIS is a suit in chancery, for dower in a tract of land, conveyed away by the husband

during coverture. The circuit court decreed dower KAY  
to the complainant, and approved the report of the VS  
commissioners appointed to make the assignment. JONES.  
The only objection made in this court to the decree,  
is, that the complainant had legally relinquished  
her right of dower, by concurring with her hus-  
band in the conveyance.

The deed purports to be a conveyance by hus-  
band and wife. The name of each is subscribed to  
it; and two justices of the peace of Culpepper county,  
Virginia, in which county the appellee and her hus-  
band then resided, certified on the deed, that the  
husband had acknowledged it in their presence, and  
that the wife, being privily examined, also ac-  
knowledged it, and relinquished her right of dower.

That certificate having been properly authenti-  
cated, the deed was recorded in the proper office in  
this state, in due time.

The counsel for the appellant, insists that the cer-  
tificate of the justices, is sufficient to show that the  
right of dower has been legally relinquished. And  
the counsel for the appellee contend that the certi-  
ficate is insufficient, because it does not shew that  
the deed was "*subscribed*" in the presence of the jus-  
tices. The point thus involved, is the only one pre-  
sented by the assignment of errors, for consideration  
by this court.

As the common law has no bearing on this case,  
the statute law of this state must alone decide the  
controversy.

As there was no *dedimus* to the justices who made  
the certificate, the only statute which applies di-  
rectly to the question now presented, is that of 1792,  
I Digest 310, afterwards incorporated in an act of  
1796, regulating conveyances. The first section of  
the act of 1792, declares, in substance, that husband  
and wife may "*acknowledge and subscribe a deed, in  
the presence of two justices of the peace, in the  
county where they reside;*" and that the said jus-  
tices, having privily examined the wife, and as-  
certained that she fairly relinquished her right of  
dower, should "*certify the same.*"

The second section provides that parties residing  
in any other state, may convey in the same way.

Conveyance  
of land, certi-  
fied by jus-  
tices of any  
other county  
than that in  
which the  
land lies, d.  
not pass

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title from vendor, unless the certificate shew not only that the conveyance was acknowledged, but also subscribed by him in their presence.

This court has frequently decided, that a conveyance certified only by justices of any other county than that in which the land lies, does not pass the title from the vendor, unless the certificate shew, not only that the deed was acknowledged, but also subscribed by him in their presence. See *Womack and Wilson vs. Hughes* (Littell's select cases, 292.) *McConnel vs. Brown* (Ib. 459.) *Hynes vs. Campbell* (VI Monroe 288.) The doctrine thus settled by these authorities, whether right or wrong, cannot be now disturbed.

When justices of another county than that in which the land lies, certify a conveyance of it by husband & a relinquishment of her dower therein by the wife, the certificate must shew that husband not only acknowledged the conveyance, but subscribed it in the presence of the justices, otherwise the wife is not divested of her dower in the land. No statute which prescribes any mode for relinquishment of dower, during life of husband, unless he, by concurring in a conveyance divest himself (or has previously divested himself) of his fee.

The expression, "*shall certify the same,*" must be construed as comprehending every thing which the first section requires to be done by the wife as well as the husband.

If it be necessary that *she* should subscribe her name to the deed, the justices should certify that fact.

The Chief Justice is of opinion that, in the class of cases to which the act of 1792 applies, the subscription of the wife's name in the presence of the justices, and her privy examination and voluntary relinquishment, are both necessary to divest her of her dower; and that, therefore, as the justices were not commissioned by *dedimus* according to the statute of 1797, their certificate (even if it had been sufficient as to the husband) is insufficient in this case to shew that the appellee had ever divested herself of her right to dower.

On this point, Judge Buckner is unwilling now to express any opinion; and therefore it will not be discussed or definitively settled in this case, especially as the decree may be affirmed on another point.

The justices did not certify that the husband had subscribed the deed in their presence. And we know of no statute which prescribes any mode for relinquishing dower, during the life of the husband, unless he shall concur in the conveyance, and divest himself, or have previously divested himself of his fee.

As, therefore, there is no proof that the appellee's right to dower was ever relinquished according to law, and as equity must, in such a case, follow the

law, the decree must be affirmed, even though facts <sup>LOGAN</sup> may exist, which might render the appellee's claim <sup>vs.</sup> questionable, if tested by the principles of perfect STEEL'S H'S. honor, instead of the rules of positive law. Decree affirmed.

## Logan vs. Steel's Heirs.

RULE.

Error to the Fayette Circuit; HICKER, Judge.

Case 10.

*Error coram nobis. Motion. Rules. Execution.*

Chief Justice ROBERTSON, delivered the opinion of the Court. November 9.

THIS writ of error is prosecuted to reverse an order of the circuit court, quashing two executions of *fieri facias*, and a sale of land made under them or one of them. A rule was served on the plaintiff in error, (defendant in the circuit court) requiring him to shew cause why the execution and sale should not be quashed, for several errors in fact and in law, specified in the rule. He appeared and demurred to the assignment of errors, but the court overruled the demurrer and quashed the executions and the sale, the plaintiff in error being the creditor and purchaser.

As the executions are not in the record, this court cannot decide that there was no sufficient error apparent on their faces, to justify their *quashal*. None of the errors, except perhaps the eighth, which is an error in fact, can be deemed sufficient for quashing the sale; but as the record does not shew what testimony was given on the trial, this court cannot decide that facts sufficient to sustain the *quashal* of the sale, for the eighth error, were not proved.

Nor was there any ground for sustaining the demurrer, unless it be erroneous to unite errors in fact and in law, in the same motion or rule.

If the ancient mode of proceeding by writ of error *coram nobis* had been adopted, instead of the less technical and the usual modern remedy, by motion or rule, there can be no doubt that the circuit court

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In a writ of error *coram nobis*. to unite errors of fact and law is error.

ought to have sustained the demurrer. For it is well settled, that it is error to unite in such a writ, both fact and law; because, 1st, such confusion in *pleading* is inconvenient and incongruous; and 2d, the mode of trying the fact and that of deciding the law, are different; the former being (in such a case) tried by a jury, and the latter being decided by the court.

It is not necessary in motions, to observe the same technical strictness which is required in pleading.

But neither of these reasons applies to the less formal proceeding by motion. Motions and rules, are tried by the court without a jury, whether they contain matter of fact or of law; and it is not usual or necessary in a motion, to observe the technical strictness required in pleading.

Errors in fact and in law may be joined in a motion to quash an execution, or in a rule to shew cause why an execution or sale shall not be quashed.

Wherefore it seems to the court, that errors in fact and in law, may be well joined in the same motion or rule, for quashing an execution or sale; and consequently the circuit court did not err in overruling the demurrer to the assignment of errors. Nor is there any thing in the record which will authorise a reversal of the order quashing the executions and sale, even though it may have been, in fact, erroneous.

Judgment affirmed.

*Wickliffe* and *Wooley* for plaintiff; *Haggin* for defendants.

## EJECTMENT.

### Dent vs. Simmons.

Case 11.

Error to the Bullitt circuit; BOOKER, Judge.

*Ejectment. Habere facias possessionem.*

November 9. Chief Justice ROBERTSON, delivered the opinion of the Court.

SIMMONS having obtained a judgment in ejectment against Dent, caused a *habere facias* to be issued, and was put into the possession of the land by the sheriff. After Dent and his family and household goods had been expelled, and Simmons had closed the house, Dent's family were permitted to take temporary shelter in the kitchen, and the writ was returned executed. Dent having shortly

After a judgment in ejectment has, as evidenced by the official return on a *habere facias*, been fully executed by

afterwards re-entered, in the absence of Simmons, or refused to surrender, the circuit court, which had rendered the judgment, made an order, on the application of Simmons, directing an *alias* writ to be issued.

This writ of error is prosecuted to reverse that order.

As the judgment had been, according to the official return on the writ, fully carried into effect by evicting Dent, and giving the actual possession to Simmons, the circuit court had no longer any control over the case, and no more authority to direct a *habere facias* to issue, than it would have had if no judgment had ever been rendered. If Dent dispossessed Simmons, the proper remedy for restitution, was a warrant for forcible entry. All that the judgment in ejectment authorised, had been effected by the actual eviction under the *habere facias*. Wherefore the order for an *alias* writ is erroneous and must be reversed.

*Crittenden* for appellant.

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evicting the tenant in possession and giving actual possession to the plaintiff, it is error to award an *alias habere facias*.

## Crowdus vs. Hutchings.

ASSUMPSIT.

Error to the Simpson Circuit; BRODNAX, Judge,

Case 12.

*Insimul computassent count. Evidence. Reversal.*

Judge BUCKNER delivered the opinion of the Court.

November 9<sup>th</sup>

THIS was an action of assumpsit, prosecuted by Hutchings against Crowdus. It was tried on the general issue, and a verdict rendered for the defendant in error, for \$1637 11. The court having overruled a motion for a new trial, made by Crowdus, judgment was entered against him; to reverse which he prosecutes this writ of error.

Two points only are presented, which it is considered necessary to notice: 1st. Did the court err in refusing to exclude from the jury an account offered by Hutchings? 2d. Did it err in rejecting the testimony of Todd, a witness introduced by Crowdus?



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To authorize a recovery on an *in simul computassent* count, it is not necessary that each item of plaintiff's account be proved, provided it is proved that the parties accounted together and defendant acknowledged that a sum certain was due the plaintiff.

When circuit court has rejected testimony which was inadmissible, unless it succeeded that of a witness introduced by the opposite party, and the record does not shew at what time the rejected testimony was offered, the judgment will not be reversed because of the rejection of the testimony.

The account alluded to, consisted of various items, amounting in the aggregate to \$1968. At the foot of it was the following memorandum: "The above acct. is entitled to a credit of \$330 96, for a balance on settlement, between Crowdus and Hutchings, February 18th 1829," which was signed with the name of Crowdus; and the signature proved to be in his handwriting. The correctness of each particular item of the account, was not supported by the proof; but among other counts in the declaration, was one on an *in simul computassent*.

The memorandum attached to the account, does not amount to an express promise to pay. If it did, ~~assumpsit~~ it would not have been the appropriate remedy. But on the count mentioned, it was not necessary to authorize the verdict returned, that the items of the account should have been proved. If the parties accounted together, an acknowledgment by Crowdus, that a sum certain was due, created an implied promise on his part, to pay the amount. There was, to be sure, no positive proof, that they had so accounted; yet it was such as justified the court in submitting it to the determination of the jury. It was a proper subject for their decision; and the court therefore, did not err in the opinion advanced, nor in refusing to grant a new trial, on the ground that the verdict was contrary to the evidence.

Todd's testimony, if admissible at all, was clearly not so, unless it succeeded that of a witness introduced by Hutchings, which it is insisted rendered it important. But it does not appear from the record, at what stage of the trial it was offered, and we will not presume, in the absence of proof shewing it, that the court erred.

The judgment is, therefore affirmed, with costs: (Judge Underwood dissenting.)

### DISSENT.

*Judge Underwood dissenting from the majority of the court, delivered his own opinion as follows:*

It is my opinion that the judgment ought to be reversed, because the testimony of Todd was rejected by the court. Upon the face of the record, this tes-

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timony was important to the defendant as counteracting the influence which testimony offered by the plaintiff, and admitted by the court, was calculated to have. It is, therefore, manifest, that the testimony of Todd might, in the opinion of the jury, have been entitled to weight. What its extent would have been, it is not important to inquire, for that belonged to the jury. Now when the record shews that a party has been deprived of evidence, in consequence of its rejection by the court, which, if admitted, might have had an important bearing in his favor, it seems to my mind that there has not been a full and fair trial of the cause upon its merits, and hence I would, to secure such a trial, reverse the judgment. There is no way to escape the propriety of this conclusion, unless we suppose that the testimony of Todd was given before the evidence which it was intended to counteract had been heard, and that consequently Todd's testimony at the time it was given, was altogether irrelevant. I am averse to entering upon such conjectures, when the face of the record shews that it was relevant. If the plaintiff who objected to it, did so on account of the time at which it was offered, I think it was the duty of the court *ex officio*, after the plaintiff had introduced his evidence, which Todd's testimony was calculated to counteract, then to withdraw the exclusion of his testimony, and not to permit the exception to its exclusion to stand as part of the record. If the court will not do this, but permits the exception to stand, I take it that the court thought the testimony excluded, incompetent under a view of all the facts exhibited by the record, and that it was not excluded merely because it was offered at an improper time. But it seems to me that it does not lie in the mouth of Hutchings to say in this writ, that there should be no reversal, because the plaintiff in error introduced Todd as a witness to counteract his evidence, before it was heard. The question should rather be, whether Todd's testimony would have had that effect had it been admitted. Whether it would or not belonged to the jury. Moreover, there is nothing to shew that Todd's testimony was offered before the evidence which it was designed to counteract. The natural order and

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practice in such cases, required that it should follow. Presuming as I do, that the circuit courts conduct business properly, until the contrary appears, I take it from the record that Todd's testimony succeeded that which it was intended to counteract, and that the circuit court decided that Todd's testimony was inadmissible, because it was intrinsically improper, and not because there was nothing before the court which shewed its relevancy at the time of its rejection. This seems to me to be the fair conclusion, from the generality of the exception, which shews no particular reason for excluding the testimony of Todd, and from the whole face of the record; and therefore I think the judgment should be reversed.

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*The counsel for the plaintiff in error presented a petition for a re-hearing as follows:*

There has certainly been great injustice done to the plaintiff in error. He does not owe Hutchings one cent, as we verily believe; and it is earnestly hoped, that on a re-examination of the record, the court will find abundant cause for a reversal of the judgment, and ordering a new and fair trial of the cause.

It has been held by the court, that the account of Hutchings against Crowdus, with the statement annexed by Crowdus, that that account was entitled to a certain credit, was admissible under the counts of *insimul computassent*. And it is perfectly plain it could not have been admitted under any other count. But it is respectfully urged that the account and annexed statement, on being again examined, will be found clearly inadmissible at this door.

In the first place, neither of the counts of "*insimul computassent*," (for there are two of them) agree in amount with the balance which it would seem was found, as Hutchings contends, against Crowdus on the accounting; and the variance must be fatal.

The first count states that Crowdus was found \$1642 61 in arrear; and in the second count, the balance is stated at \$1973 50. Now the account exhibited for the purpose of proving the accounting, shews the total sum of \$1968 against Crowdus; a

sum not agreeing with either count. And the sum stated by Crowdus as the amount he was entitled to credit for, was \$330 89, which deducted, leaves the balance of \$1637 11; a sum still different from any named in the declaration.

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It cannot require an authority to prove that when the plaintiff goes on his account stated, or his certain sum agreed on as the balance in his settlement, he must prove his case as he states it. He may afterwards recover less, if he proves the balance as stated; but if he does not succeed in this, he fails for the variance, and the evidence ought to be excluded. Even without the variance, it was believed with great confidence, that the account was inadmissible. It is stated by Crowdus, that there had been a settlement between him and the plaintiff, but not of the accounts found on the paper; and he says there was a balance found, not against him, but in his favor, for the sum of \$330 89; and he says this account of the plaintiff against him, was to be credited by that sum. But does this prove the account was settled? No merchant or accountant in the country would say so; and such is not the import of the terms; they only say this, "Our *other* accounts have been settled, and shew that you, Dr. Hutchings, owe me \$330, which may be credited on this account; but as to this we have not settled."

It is exceedingly questionable whether these accounts and endorsement have not been shuffled in some very improper manner, so as to present the case in even this equivocal character. And surely it ought to be a strong case to authorise a judgment on such a pretended accounting together, without proof of either contract or consideration.

Because if this account, (this paper we mean) was competent, it was just as good without the other evidence as with it. But without this paper was evidence, the plaintiff below did not give testimony conducive to prove one half of the amount he recovered.

But the amount recovered, was certainly too great even if the account was correct, as admitted in evidence. The amount stated at the foot of the account, as we have said above, was \$1968; and the

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credit was just 330 89, leaving the balance of \$1637 11 apparently, and for this sum precisely, the verdict was rendered. But there was a large amount of the account, consisting of a number of items, erased or stricken out. When this was done, cannot be important; if before the alleged acknowledgment by Crowdus, then he admitted the other items only; if at the time of the settlement, then these items were excluded by the *insimul computassent*, and the balance agreed on; or if these erasures were made afterwards by Hutchings, then the whole paper ought to have been excluded. These stricken out items, are for the following amounts, viz: \$8 50, \$1 25, \$2 50, \$15 25, \$12, and \$15 17; amounting in the whole, to the sum of \$54 67.

But since making the foregoing calculation, we have looked farther into this account; and the apparent additions are nearly all found but little better than guess work; scarcely one addition correct. In the two last additions, for example, one consisting of three and the other of four lines, and both are wrong; one for \$1, and the other for \$95.

Now it appears by those two palpable errors, the verdict is \$96 too great. And is this the *insimul computassent* that is to bind our client?! The jury went by it, or rather by the amount they found at the bottom, to a single cent. But the items and amount of the account, were never understood as so much of claim or active demand against Crowdus. Two of the items are for "cash paid said Crowdus;" and does not this import that Hutchings owed him? A negro girl, Cate, is next charged, and then four recent *lost* or *destroyed*, and we suppose for money due. And then comes "errors at sundry times." Crowdus held a mortgage on Hutching's slaves and horses at that time, and it is expressly proved that the brick house, purchased from Hay, was bought for Crowdus; and as to the great number of items, consisting of merely the name of a man with dollars and cents attaching to them, we can tell neither head nor tail of them. But this the court must be satisfied of Crowdus was wronged *sixteen hundred and odd dollars!!*

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But the evidence of Todd ought certainly to have been received. It is impossible, and the court does not believe from the record, that this testimony was offered before Stratton and Curd were examined. When was exception to the reception of Todd's evidence presented? Not during the trial, but after it was over and all closed. Regularly, the exception ought to have been made during the trial, and at the moment of rejection; at the stage in the cause when the event transpired. If the court will presume on this subject, they must take this presumption; and if so, the evidence was presented at the last. Besides, it is against the natural order of things, to suppose that it was introduced before plaintiff's evidence attacking the receipt was introduced.

The history of the record is, that the plaintiff gave in evidence of his supposed settled account; then closed.—The defendant his receipt, after proving it by the subscribing witness, and he closed. So far, there could not be the least need of the evidence of Todd. The plaintiff next brought on his attack on the receipt, by a host of witnesses.—Next, the defendant his supporting evidence. Till the genuineness of the receipt was attacked, there was no call for defence. Then, and not till then, if common sense is presumed to be the guide in the law, could the supporting evidence be introduced. The exception is after all the evidence is written, and why is it not stated in this exception, the moment of time as well as the preceeding evidence? The answer is obvious. The evidence was previously placed on the record, and it was unnecessary; and it was for this reason that the exception is silent.

The inferior courts are always ready to give their reasons, and if this evidence was offered and rejected, because it was an improper moment, how ready would the Judge have been, to have stated it. If the cause of the rejection of Todd's evidence was, that the plaintiff's evidence against the receipt had not been then given, it would certainly have been afterwards presented. Instead of this, he placed the exception after all the evidence.

But the view taken by the dissenting Judge has no answer. It may be enlarged. Remember that

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often when a witness has been introduced, and a question asked, that question indicates what answer is wanted; and on objection, the witness is not permitted to answer at all; the evidence is excluded before it is heard. On other occasions, the witness is heard, and his story told; and thus to get clear of the evidence, the objector has to move the court to withdraw it, or to tell the jury to disregard it. This latter course was followed in this instance. The witness was heard, and his testimony given, and the court withdrew it, and directed the jury to take it out of the amount before them.

Now suppose this to have been done before the witness for plaintiffs was heard. Afterwards the witness for plaintiffs was introduced. Ought not the court then to have told the jury, the first decision was withdrawn, and Todd's evidence left with them for what it was worth? Certainly, if the court did not, it was grievously wrong. Did the court do this? The record is conclusive that it did not; for the court certifies *all* the evidence, and in that *all*, excludes Todd's. The court then, is convicted of withdrawing from the jury, the full weight of Todd's evidence, and this is conclusive.

Such a reason for disregarding a bill of exceptions, as to the admission of the evidence, has never heretofore been adopted by this court. The inquiry when the whole issue and evidence has been certified, has been: Was the evidence rejected pertinent to the issue and circumstances proved? If so, a reversal took place, and the evidence was let in, unless the court itself shewed that the evidence was offered at an improper moment. The reason of this rule is apparent. If the court affirms, the appellant loses forever, the benefit of his evidence. When, if it is reversed, the benefit of the evidence is had, and if the other is able to rebut or disprove it, he is not injured, and the trial is fair. If he is not, then he ought to be bound by it, and the rights of the appellant are preserved, and he is not caught in a snare.

While courts presume in favor of the court below, they also presume that counsel below has acted according to the rules of common sense. But the court has given a reason for withholding a reversal,

which, we trust will, for the sake of legal principles, be withdrawn. It is this: We are satisfied that had *Todd's evidence* been admitted, it ought not to have produced a different result. This is the opinion of the court, but the parties and court below, thought differently, else one would not have introduced it, the other objected, and the court have set it aside. Who has a right to settle this difference, and determine on the weight and effect of this evidence? Not this court, but the jury exclusively; and yet this court has assumed the right to decide it!

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Ought this court to say that when pertinent evidence is rejected, it is no injury, there was enough to have overturned it if it had been let in; or if improper evidence to prove a fact is admitted, it made no difference, for there was proper evidence enough to prove the same fact without it? Yet this court has said so.

To shew the court how careful this court has been on this subject, we report the case of *Brooke vs. Clay, III Marshall, 550*. There, improper evidence, hearsay, and reputation was admitted to prove the place of nativity, and excepted to. Afterwards, during the progress of the cause, abundance of proper evidence was admitted or introduced, proving the same fact; yet this court reversed for that cause alone, because it could not be told whether the proper, or the improper evidence, had the most weight, or whether the jury took both together, and the finding must be on the proper evidence alone.

How easy would it have been, to have said as the court has done here, the description of this evidence made no difference, especially as the exclusion of it would, and "ought not" to have made a different result? The court, however, thought this assumption an unsound one; yet the court has carried out a much stronger decision on evidence, by depriving a party altogether of it, and then saying, this deprivation makes no difference, for the party ought to have been defeated with or without it. This is placing strong reliance upon the evidence of the plaintiff, when he attempts to prove his confessed handwriting a forgery.

Here we cannot help observing, that the great mass of the plaintiff's evidence on this point, was



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composed of incompetent evidence—the opinions of witnesses alone.

Now we assert without fear of contradiction, that opinions of witnesses, not on the handwriting, but upon inks or kinds of inks, shape of paper, and what had been, or was probably attached to the paper, was wholly incompetent, and for this we refer, both to Philips and Starkie, on the admissibility of opinion.

Shall this opinion then, be so strong as to render Todd's evidence of no weight? Indeed, when the question is between *genuineness* and *forgery*, we do insist that Todd's testimony is not improper. The forgery implies that the defendant *secretly* manufactured the evidence to defend the case. The circumstance that the same evidence had been seen and inspected months before, in its present state, is calculated to repel this implication or presumption. To this it may be answered, that the document might have been manufactured before Todd saw it. This is *possible* but the *probability* is overturned by the fact of its existence at a former period. But whether this be correct or not, the facts known by Todd, were material in the whole case. The court admits its relevancy and pertinence, if offered at a proper hour; and although this court has said, "if heard it was not sufficient;" yet we do contend that the jury, and not this court, have the right to say this. The discovery of new evidence is ground, if pertinent, to grant a new trial; and when was it heard that a court refused to grant a new trial, on the discovery of relevant testimony, by assuming, that if heard, it would not be sufficient when so heard?

The majority of this court seems not to have attended to this part of the record. The defendant moved for a new trial. One of the grounds is, that the court below had admitted improper evidence for plaintiff, and excluded proper evidence for defendant. What proper evidence? Why that of Todd. Here the mind of the court below, must act on all the evidence, and the court had heard Todd's evidence, and knew its relevancy; and also knew that it was rejected, and that it conduced, in some degree, (we cannot say how slight,) to produce a different

result, and yet the court refused to give a new trial, to let this evidence in its proper place. There is no escape from this, even if it be supposed that the evidence was rejected because it was offered at an improper moment.

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We will further observe that we are in strictness entitled to a new trial. We had no opportunity of meeting or seeing the arguments of our adversary in the cause, although we find it there now. It is an unbending rule, that such arguments shall not be used, unless submitted to the adverse counsel, yet our adversaries have taken a different course, and have been heard *ex parte*. This is an exceedingly inconvenient practice. Not supposing it would be proper to acquiesce in the practice of allowing counsel to present arguments to the court, never seen or heard by the adversary counsel, one of the counsel of the plaintiff in error, has declined looking into the argument of the defendant's counsel. Its existence was never heard of until since the opinion of the court was delivered.

*Per curiam.* The petition is granted.

*After a re-hearing of the cause, Chief Justice Robertson delivered the opinion of the court as follows:*

On reconsideration, the court (Judge Underwood dissenting) adheres to the former opinion, which must, therefore, remain unchanged.

— Monroe, Mills, and Brown for defendant.

## Mitcherson *et al* vs. Dozier.

CHANCERY.

Error to the Caldwell Circuit; SHACKLEFORD, Judge.

CASE 13

*Contract. Consideration, failure of. Obligor and obligee. Injunction. Damages.*

Chief Justice ROBERTSON, delivered the opinion of the Court. November 10.

THE heirs and personal representatives of E. Mitcherson, deceased, filed a bill in chancery, to enjoin a part of a judgment, for \$123, obtained against them by James I. Dozier, on a note ex-

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ecuted by their ancestor and intestate. The injunction was accordingly granted, and Dozier answered.

It seems from the record, that E. Mitcherson had employed Dozier as an attorney and counsellor at law, to defend him against a criminal prosecution, and gave him as a fee, the note on which the judgment was obtained; that Dozier attended the court at which the trial was expected, but the prosecution abated by the suicide of the accused. Hence the plaintiff insists that there is a partial failure of consideration, and on that ground the bill was filed.

On the hearing, the bill was dismissed, and the injunction was dissolved with damages. That decree is now called in question.

It is manifest that the principal service, the expectation of which induced the execution of the note, was never rendered; and that consequently, to that extent, the obligor was never benefitted, nor was he (as to that) subjected to loss labor or inconvenience.

But the promise to perform the service, was the consideration of the note. The performance was not a condition on which the obligation of the note depended. A suit could have been maintained on the note, even if Dozier had refused to perform the service which he promised to perform. But if by any act or omission on his part, without the default of the obligor, the stipulated service had not been rendered, there would have been a partial failure of consideration, for which the chancellor might have given relief to the proper extent, against the legal obligation of the note. The law would not, however, imply any condition in the contract, that the promised service was to be performed before the note was due and collectable. Nor would either law or equity exonerate the obligor from the payment of the note, or any part of it, merely in consequence of non-performance by the obligee, when he was ready and willing to perform, (as he appears to have been,) and was prevented by the voluntary act of the obligor. The obligation could not thus be impaired, nor the contract be thus modified without the assent, or fault, of the obligee.

If a person, who is indicted for a crime employ a lawyer, and execute his note for the amount of the fee, and then, before his trial, commit suicide, the

If the obligor had died a natural death, the case might (perhaps,) be different. But we cannot decide, that suicide is not a voluntary act, or that it is, *per se*, evidence of mental derangement, or, of a fatal necessity; and one party cannot, by his own voluntary act, deprive the other of the benefit of his contract. We cannot distinguish between the principle of this case and that of *Hickman vs. Major*.

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fact that lawyer did not perform the principal service for which the note was executed, (to wit: the defence of the criminal on his trial,) is no ground for impeachment of consideration of the note either at law or in equity, because the non performance resulted from act of obligor himself.

It seems, therefore, that, if the performance of the promised service had been the sole and entire consideration of the note, there would not have been a failure of consideration, available by plea to the action on the note: and, in such a case, we know of no principle of equity which would authorize any relief in chancery. There has been no failure of consideration, because the non-performance complained of, has resulted from the act of the obligor, without the concurrence, or delinquency, of the obligee who would have performed his undertaking, if he had not been prevented by the act of the obligor.

There is, therefore, no error in the dissolution of the injunction, unless the case could be tested by the principles of casuistry or honor, and not by the fixed rules of law and equity.

When bill asks an injunction against part of a judgment only, to give, on dissolution of the injunction, ten per cent damages on the whole amount of the judgment, is error.

But the decree for damages is erroneous. 1st. The bill asked an injunction against only a part of the judgment, and 10 per cent. damages have been given on the whole amount of the judgment. 2nd. The defendant, by his answer, expressly waived his right to damages; believing, as he seemed to do, that the case is a hard one, and that the amount of his judgment was the maximum which his conscience would allow him to exact, or receive. Now, although the statute peremptorily directs a decree for damages on the dissolution of such an injunction, it does so only, because the defendant is entitled to them. But, surely he can release, or waive, such a right as well as any other; and when he does so, the chancellor should not, against his will, force him to take damages.

When defendant in his answer, waives his right to damages on dissolution of injunction, there should be no decree for damages on the dissolution of the injunction.

Wherefore, so much of the decree, as dissolved the injunction, is affirmed; but so much thereof, as awarded damages is reversed. It is, therefore, ordered, and decreed that the injunction be dissolv-

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ed without damages, but with costs in the circuit court, and under all the circumstances, it seems to the court, that there should be no decree for costs in this court.

### DISSENT.

*Judge Underwood dissenting from the majority of the court, delivered his own opinion as follows:*

It is my opinion, that the injunction in this cause should have been perpetuated. The defendant admits that the services actually rendered by him, were worth no more than \$20 ; but he insists, he is entitled to the whole fee, because he was ready to perform the balance of the service contemplated at the time the obligation was executed, and would have done so, had he not been prevented by the conduct of the testator of the plaintiffs in error. It appears, from the pleadings and admissions on record, that E. Mitcherson being indicted for forgery, employed Dozier, an attorney at law, to defend him, and executed his note for the fee during the Fall term, that Dozier attended court at the Spring term, ready to defend, but that Mitcherson failed to attend having killed himself between the execution of the note and the trial.

Dozier insists, that it was Mitcherson's fault, by taking his own life, that prevented the performance of the balance of the service which he, as counsel, could otherwise have discharged at the Spring term, and therefore, it should be taken, that he had performed. I admit the general rule that, if either party to a contract, by his fault, prevents the other from performing, it furnishes an excuse for the non-performance which will be as good as the performance to entitle the party so prevented, to his action. I am, also, willing to allow, that if Mitcherson had appeared in court at the Spring term, to answer the indictment, Dozier would have exerted his best talents in the defence. But, still I am unwillingly considering the circumstances of this case to decree money to Dozier, which he himself acknowledges, was never earned and now never can be. If Mitcherson had died a natural death, surely Dozier would not have been entitled to the whole fee. *Actus Dei laedit*

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*remini*. If the maxim is true, that the act of God shall work injury to no man, it seems to me that it would be a violation of the maxim to permit Dozier to profit without labor, or expense, and to inflict a correspondent loss upon others, in case Mitcherson had come to his death in the ordinary course of age and decay, or, by sudden disease or accident. If all this be conceded, yet it may be contended that the maxim quoted does not apply to the case of a *felo de se*, and as it is admitted that Mitcherson killed himself, it may be urged that his death was voluntary, and therefore, it makes out an excuse for Dozier equivalent to his performance. It has always presented to me a question of difficulty, whether any one could be considered of sane mind, who voluntarily takes his own life. Without deciding that a person who violates the first and paramount law of nature by laying violent hands on his own life, must be insane, it may, I think, be safely affirmed that it requires powerful excitement to prepare the mind for such an act, and that under the state of feeling necessary to induce the deed, the faculties of the mind are not in a natural condition, and consequently, that a *felo de se* is not in the general capable of reflecting and reasoning with that degree of perfection which he would, if laboring under no such unnatural excitement. It frequently happens, that those who take their own lives are absolutely deranged. Now, it seems to me, that if Mitcherson took his own life in a fit of derangement, it may have been done under such circumstances, as that the act would be no more chargeable to him, than if he had died a natural death. It does not appear, under what circumstances Mitcherson took his life. It is admitted, that he killed himself, and that is all. The failure of the consideration is shewn by the death of Mitcherson, admitted in the answer, and if his death took place under such circumstances as to entitle Dozier to his full fee, I think he ought to have shewn it. He has not done so.

But again, could Mitcherson be in default for not appearing in court at the Spring term, when he was dead? Will his recognisance be forfeited and his executor, or his bail, be compelled to pay the money?

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ney if he committed suicide, without the least palliation arising from the condition of his mind? I am disposed to think, that his death, without regard to the manner of it, discharges the recognisance and releases his bail, and I am, likewise, inclined not to consider the manner of his death, and seize on that as shewing no failure of consideration, when if he had died a natural death, it would, in my opinion, be a clear case. I do not regard the case as the same in principle as that of *Majors vs. Hickman*, II. Bibb, 216. I therefore dissent from the opinion delivered.

CHANCERY. **Walton's Heirs vs. Walton's Executrix et al.**

Case 14. Appeal from the Washington Circuit; W. L. KELLY, Judge.

*Wills. Land, devise of. Power to devise land. Slaves, devise of.*

November 10. Chief Justice ROBERTSON, delivered the opinion of the Court.

IN 1804, Matthew Walton published his last will which was never altered, revoked or republished, (though he lived until 1819, and in the mean time greatly increased his estate,) and by which he devised to some of his collateral relatives some specific legacies, and all the residue of his estate, real and personal, after payment of debts, to his wife.

From the Norman conquest to the reign of H. VIII. land was not devisable, except in particular places where custom authorized it.

The testator died without issue; and his widow afterwards intermarried with John Pope. This suit in chancery is prosecuted by his heirs against Pope and wife for a decree against them for the lands and slaves to which the testator was entitled at his death, and which he did not own at the date of his will. The circuit court dismissed the bill; and the only question for this court to decide is, whether, on the facts which have been stated, the decree is right.

A statute of H. VIII. authorized a person having title to land, to dispose of two thirds thereof by will.

From the Norman conquest to the reign of H. VIII. land was not devisable, except in particular

places where custom authorized it. A statute of H. VIII. authorized persons *having title* to land to dispose of two thirds thereof by will. A subsequent statute of Charles II authorized an alienation of the entire interest by will.

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A statute of Virginia, substantially reenacted in this state in 1797, (II Dig. 1242,) extended the testamentary power to all interests which the testator might have in land at his or her death. As the statute of H. VIII. was construed as restricting the right of devising land to such an interest only as the testator had at the date of the will, titles subsequently acquired could not pass in England, even though the testator had attempted to devise all the interests to which he might be entitled at his death. The British doctrine therefore was, that, as to land, the will spoke at its date, though, as to personally, it spoke at the testator's death. Consequently, a general devise of all the testator's estate comprehended all the chattels to which he was entitled at his death, though such devise, or even an express devise of after-acquired land, was not permitted to embrace any freehold interest in land acquired after the date of the will. And although in this country, in consequence of the statutes which have been cited, land acquired after the publication of the will may be made to pass by it, the supreme court of the United States, in the case of *Smith et al. vs. Edrington*, (VIII Cranch, 66,) decided that a will cannot have such an operation unless it shall clearly shew that such was the intention of the testator.

all interests  
which he may  
have in land  
at his death.

Under the statute of H. VIII. a person could dispose of no more land by his will than he had title to at the date of the will.

English doctrine was that, as to land, a will spoke at its date, but as to personally it spoke at testator's death.

In England, an express devise of land which should be thereafter acquired, would not pass land acquired after the date of the will.

In this country, land acquired after the publication of the will, may be made to pass by it.

Whether land acquired after the publication of a will shall pass

Since the enactment of the statute authorizing a devise of after-acquired land, the true doctrine seems to be, according to a proper construction and application of the opinion in *Smith et al. vs. Edrington*, that whether land acquired after the publication of the will shall pass by the will or descend to the heirs, is a question of intention, to be solved by a proper construction of the whole will. If, from the will itself, it shall appear more reasonable to infer an intention that after acquired land should pass by it, than that it should remain undevise, then it would pass by the will; otherwise, if the contrary intention shall seem more reasonable, the land will



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descend. And, according to the case in *VIII Cranch*, if there be nothing in the will to lead to the one deduction rather than to the other, land acquired by the testator after its publication should descend as estate undevise.

by it, is a question of intention, to be solved by a proper construction of the whole will.

Whatever may be the effect of the will in this case as to the land claimed by the appellants, we are satisfied the slaves born after the date of the will passed by it to Mrs. Walton.

If from the will itself it appear more reasonable to infer an intention that after acquired land should pass by it, than that it should remain undevise, then it shall pass by the will; otherwise, if the contrary intention shall seem more reasonable, the land will descend.

Since act of 1800, which makes slaves real estate, a person under 21 years of age cannot devise a slave

Since act of 1800, which makes slaves real estate, a will that would not pass land will not pass a slave.

Since act of 1800, a devi-

Ist. The statute of 1800 (II Dig. 1247,) did not alter the pre-established mode of construing a devise of slaves. That statute declares that, "slaves, so far as respects last wills and testaments, shall hereafter, within this commonwealth, be held and deemed as real estate, and shall pass by the last will and testament of persons possessed thereof, in the same manner and under the same regulations as landed property, and nothing contained in the act entitled "an act to reduce into one the several acts concerning wills, the distribution of intestates' estates, and the duty of executors and administrators," or in the fourth section thereof, which enables persons above the age of eighteen years to dispose of their chattels by will, shall be construed to contravene this act."

Notwithstanding this act slaves are still, for most purposes, deemed personal estate. The effect of the act is, that, since its passage, a person under twenty one years of age cannot devise a slave; that a will that would not pass land will not pass a slave, and that the devisee of a slave will take under the will, in the first instance, just as a devisee of land would take and hold land devised. This is the whole operation of the statute. Prior to its enactment, a general devise of all the testator's slaves would have passed such as may have been acquired after the publication, because, as to slaves as well as other chattels, the will spoke at the testator's death. The statute has not changed this rule of construction. Prior to the statute of 1800, a testator, when he made a general devise of all his slaves, was presumed to have intended all that he might own at his death.

There is nothing in the statute which should defeat, or was designed to oppose, that legal presump-

tion. The statute does not declare what slaves shall pass by will, but only prescribes how such as do pass shall be devised, by whom, and how they shall be held by the devisees. A general devise of slaves, without restriction, must now, as before 1800, be considered as speaking at the death of the testator, there being nothing in the will tending to shew a contrary intention.

The case of *Mason vs. Mason's Executors* (III Bibb, 448,) does not, as was supposed in argument, contain any intimation inconsistent with this view. In that case, fifteen slaves were devised by name, and, of course, other slaves, afterwards acquired, could not have been embraced in such a specific devise. As to such slaves, the court said in that case, that "*there is no general provision from which the testator's intention to dispose of them can possibly be inferred;*" thus clearly intimating that they might have passed by the will of the testator, had he made a "general devise" of all his slaves.

We are, therefore, of opinion, that all the slaves owned by the testator at his death passed by his will to his wife.

2nd. Even if after-acquired slaves do not pass by a general devise, still there is enough, we think, in this case to shew that the testator intended that all the slaves that he owned at his death should go to his wife, and be emancipated at her death, if she should concur in his wish to that effect.

It seems that he owned, at his death, no slaves except those whom he owned at the date of his will, and their after-born issue. Hence it is but reasonable to infer, that he desired that the children, as well as their mothers, should be free. Such a construction is fortified by the maxim, that courts should lean "*in favorem libertatis.*"

We are, therefore, clearly of opinion, that the appellants have no right to any of the slaves.

As to the lands claimed in the bill, there is no allegation or prayer which gave the circuit court jurisdiction to decide to whom they belong. If they did not pass by the will, they descended to the heirs, and they would, in that event, have had a

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see of a slave takes under the will in the first instance, just as a devise of land takes and holds land devised.

Notwithstanding the act of 1800 has made slaves real estate, a general devise of slaves will pass all those which the testator has at his death.

General devise of slaves will be considered as speaking at the death of the testator, notwithstanding the act of 1800 makes slaves real estate.

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complete legal remedy for recovering possession of them. They have not prayed for partition. Their bill seems not to have been drawn with any such view, or for any such purpose. The only point submitted for decision was the effect of the will. The answers denied that the circuit court had jurisdiction; and there is neither allegation nor proof that either of the appellees is, or was, in possession of the land.

It was proper, therefore, to dismiss the bill for want of jurisdiction to make any decree establishing the right to the lands. We shall not, therefore, intimate whether the general devise of estate, real and personal, and the charge of debts on the whole, should be construed as including all the lands as well as slaves owned at the testator's death. The dismissal of the bill will not bar any suit at law to try the title to the land.

Decree affirmed.

*Monroe and Rudd* for appellants; *Richardson, Mills and Brown* for appellees.

INDICTMENT.

## Commonwealth vs. Thruston.

Case 15.

Error to the Shelby Circuit; Todd, Judge.

*Witness. Evidence. Slaves, importation of.*

November 10. Chief Justice ROBERTSON, delivered the opinion of the Court.

THRUSTON was indicted for importing slaves into this state in violation of the statute of 1815, and a verdict and judgment having been rendered in his favor, the commonwealth complains that the circuit court erred in refusing to compel a witness to testify to facts against the accused, which he (the witness.) said, on his oath, would operate to his own prejudice.

The counsel for the defendant insists, that the witness was not bound to testify, and that, if he had been, the judgment should not be reversed, because

the indictment does not charge any offence denounced by law. COM'LTH.  
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1st. We are of opinion, that the witness should have been required to state, whether the defendant in error imported the slaves, or not, even though he swore that he would be liable for half the fine, if the defendant should be found guilty, and could not, *in his own opinion*, answer the questions propounded to him, without prejudice to his defence to a prosecution pending against himself for the same offence charged against the defendant. He might have answered either affirmatively, or negatively, the question, "Do you know that Dr. Thruston (the defendant in error,) brought slaves from Virginia, and when?" without implicating himself; and as to his obligation to pay half of any fine assessed against the defendant, that, for aught that appears, may have been merely civil, and a witness will not be excused merely because he may subject himself to a civil suit.

A witness will not, merely because he may subject himself to a civil suit, be excused from testifying.

2nd. The indictment is good. Importation alone may be an indictable offence; a subsequent sale is not a necessary ingredient in the constitution of an offence prohibited by the act of 1815, (II Dig. 1162.) The importation is one offence, the selling is another; for each of which a distinct penalty is denounced.

Under act of 1815, importation of slaves into this state, is one offence and selling of them is another.

But the act declares that, on an indictment for importing, proof of *both importation and sale shall throw on the accused the burthen of shewing that he is excused by being brought within some one of the exceptions prescribed in the act.* This construction of the act will, alone, give harmony and effect to all its provisions.

Wherefore, as the circuit erred in refusing to compel the witness to answer the question which has been quoted; the judgment is reversed, and the cause remanded for a new trial.

Denny, Atto. Gen. for Com'lth; Richardson for defendant.

CHANCERY.

**Moore's Trustees vs. Howe's Heirs.**

Case 16.

Appeal from the Bourbon Circuit; FRENCH. Judge.

*Detinue, action of. Detention. Slaves.*

November 12. Chief Justice ROBERTSON, delivered the Opinion of the Court.

IN 1791, John Dunlap, then resident in South Carolina, published his last will whereby, among other things; he devised some slaves, by name, to his daughter Jane, and other slaves to his daughter Cynthia Kid, and directed that, if either of his said daughters should die leaving no issue and the other surviving, the survivor should take "the part" devised to the one thus dying; and that, if both should die without issue, his wife, Elizabeth, should be entitled, "during her life," to the perproperty devised to them; and that, if she should have no issue at her death, the said property should go to his "sister Isabella Howe and sister Jane Howe's children." Early in the year 1792, Cynthia Kid died childless, her father, mother and sister Jane surviving; shortly after her death the testator removed to Kentucky, and settled in Bourbon county, and there died in the year 1792. His will having been admitted to record in the county court of Bourbon, his daughter Jane claimed and took possession of all the slaves devised to her and to Cynthia Kid. She never married, but lived with her mother until 1820, when she died childless. The mother survived until 1825, when she died also, without issue. In 1824, she made a marriage settlement with her husband, John Moore, (whom she had married in 1818.) whereby they conveyed all her estate, (including that acquired by the death of her daughter Jane,) to trustees subject to such uses as she should, by her will, or otherwise, appoint. She afterwards, by her last will, directed the trustees to appropriate the estate to public uses specified in the will.

Shortly after the death of Mrs. Moore, the heirs of Isabella Howe and Jane Howe sued her said trustees in detinue for the slaves in their possession devised to her during her life, and claimed under the executory devises which have been mentioned. The circuit court rendered a judgment for the plaintiffs

in the action, and this court substantially affirmed that judgment. See *Moore's trustees vs. Howe's heirs*, IV Monroe. MOORE'S  
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Afterwards this suit in chancery was brought by the heirs of Jane and Elizabeth Howe against the trustees of Elizabeth Moore, asserting a claim to the hire of the slaves, (who were recovered in the action of detinue,) for the time which elapsed from the date of the judgment until the slaves were surrendered, and also praying for a decree for the value of a slave, the daughter of one of those devised to Jane and Cynthia Kid Dunlap, and who was sold in 1818, and taken by the purchaser to the state of Mississippi, and also for the value of three other slaves sold in 1817, and taken by the purchaser to Missouri; and also for the value of some slaves who had gone, or had been sent to the state of Ohio, and there settled; all of whom are embraced by the executory devise under which the complainants claim.

The answer does not admit many of the material allegations of the bill, and denies that it contains any equity.

The circuit court sustained a demurrer to so much of the bill as asserts a right to the hire, and decreed that the trustees should pay to the complainants, out of the trust estate, \$2,500, the supposed value, at the date of the decree, of the slaves in Mississippi, Missouri and Ohio. From that decree both parties have appealed.

The decree on the demurrer must be affirmed with costs. We know of no remedy for recovering for the detention of the slaves after the judgment in detinue, as they have been surrendered in pursuance of that judgment. On the contrary, it has been expressly decided that, in such a case, there is no remedy. See *Head vs. Perry*, (I Monroe. 253.) *McClannahan's heirs vs. Henderson's heirs*, (Ibid. 261.)

After slaves, recovered in action of detinue, have been surrendered in pursuance of the judgment, there is no remedy to recover for the detention of them between the date of the judgment and the surrender of them in pursuance of the judgment.

The decree against the trustees, is erroneous. If Mrs. Moore did any thing of which those entitled to the slaves on the contingency of her dying without issue, could rightfully complain, her personal representative would alone be responsible for her wrong. The trustees are not sued as her personal representatives, but in their character of trustees

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simply. In that character they must be considered as purchasers. Whether the deed to them could be successfully assailed by her creditors, or by any persons, who might, by judgment, or otherwise, become the creditors of her estate, no means are furnished by this record for deciding; nor would it be proper to decide that question until the appellees shall, by a judgment, or decree, against her personal representative, establish a right to assail the deed, as ineffectual against them. And it would now be premature to determine, whether or not, her personal representative and the trustees could be sued, or whether a suit in chancery or any suit at all could be maintained upon the facts charged and proved in this case. It is sufficient to decide, that the appellants, being the only parties, are not liable in this suit, as trustees.

It does not even appear, that they are executors. They hold as trustees under a deed, and not under the will.

If Mrs. Moore did, or omitted to do, any thing to the injury of the appellees, her representatives would be proper parties to a suit brought for reparation.

The principles settled by this court in the suit at law, (*IV Monroe*.) establish the legal right of the appellees to the slaves for whose value, the decree in this case was rendered. They may reclaim them wherever, they may find them, or might recover their value from any persons who may have converted them since the death of Mrs. Moore. If Mrs. Moore's representatives can be made liable, in any event, for the value of the slaves sold in 1817-18, Jane's representatives should be joined with them, unless Mrs. Moore was Jane's executrix, and there be also an executor, or executrix, of her own will. But, whether the appellees can ever have any remedy against the representatives of either Jane, or her mother, for the sale made in 1817-18, or against the representatives of Mrs. Moore for the removal of other slaves to the state of Ohio, we shall not now intimate, because, as the proper parties have not been sued, we cannot decide on the merits of the case.

Wherefore, for want of parties, without considering any other point, it is decreed and ordered, that the decree of the circuit court be reversed and that the cause be remanded, with instructions to dismiss the bill without prejudice.

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*Mills and Brown for Moore's trustees.*

## Hunt vs. Terril's Heirs.

CHANCERY.

Appeal from the Jefferson Circuit; PIRTLE, Judge.

CASE 17.

*Demurrer to evidence. Special verdict. Judgment. Bar.*

Chief Justice ROBERTSON delivered the opinion of the court. November 12.

HUNT having sued Dabney C. Terril for damages for an alleged eviction from land which his ancestor had conveyed by deed of general warranty, and the jury having found a verdict for damages, subject to the opinion of the court on a demurrer to the evidence, judgment was rendered in favor of Terril.

Afterwards this suit in chancery was brought by Hunt against D. C. Terril and against others, his non-resident co-heirs, and against the ancestor's administrator, praying for a decree for damages for the same breach of covenant for which the suit at law had been brought, and alleging that land had descended to the heirs in this commonwealth. The bill sets out the proceedings and judgment in the common law suit against D. C. Terril; and the answers of the non-resident heirs relied upon that judgment as a bar to this suit, and also denied that the circuit court had any jurisdiction. On the hearing, the bill was dismissed absolutely. Hunt complains that the decree is erroneous.

Release in fact, or by operation of law, of a cause of action *ex contractu* against one of several persons jointly bound, or even bound jointly and severally, extinguishes the liability of all.

It is not necessary to decide whether the circuit court had jurisdiction; for, were the jurisdiction conceded, the decree should, nevertheless, be affirm-



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Judgment in favor of one heir or co-obligor which will bar any other suit against him for the same cause of action, will extinguish the obligation of his co-heirs or co-obligors, unless the judgment has been obtained by a defence, which applies peculiarly and alone to the party in whose favor it has been rendered.

On a demurrer to evidence, a judgment in favor of the demurrant, is a bar to any future suit on the same cause of action.

If a plaintiff desire to avoid the effect of a judgment on a demurrer to evidence, he should not join the demurrer, but should waive his evidence, and then a non-suit

A release, in fact or by operation of law, of a cause of action *ex contractu*, against one of several persons jointly bound, or even bound jointly and severally, extinguishes the liability of all. A judgment in favor of one heir or co-obligor, which would bar any other suit against him for the same cause of action, will also extinguish the obligation of his co-heirs or co-obligors, unless the judgment had been obtained in consequence of a defence applying peculiarly and alone to the party in whose favor it had been rendered.

The judgment on the demurrer is, in our opinion, a bar to any other suit against D. C. Terril, founded on the same cause of action.

As a jury could not be compelled to find a special verdict, the demurrer to evidence was adopted as a proper mode of obtaining, on the facts admitted, such a judgment by the court as should have been rendered on a special verdict, if, instead of being admitted by the demurrer, the facts had been ascertained by a special verdict. A judgment on a special verdict would operate as an effectual bar to the same cause of action. And, *pari ratione*, a judgment in favor of the demurrant, on a demurrer to evidence, must have the like effect. If the plaintiff desire to avoid the effect of a judgment on a demurrer to evidence, he should not join the demurrer, but should waive his evidence, and then a non-suit would be the only consequence. But when he joins in demurrer, he insists on the sufficiency of his facts, refuses to suffer a non-suit, and consents that the court shall pronounce such a judgment on the facts admitted, as would have been proper on a special verdict.

If a plaintiff shall suffer the jury to find a general verdict, he cannot have the benefit of a non-suit, but will be forever barred by a judgment on the verdict. So if, instead of waiving his evidence, and submitting to a *non pros.*, he ventures to take issue on a demurrer to evidence, and insists on the judgment of the court on the facts admitted by the demurrer, a judgment against him, as long as it shall remain unreversed, will bar any other suit for the same cause of action. The fact that such a judgment, if

erroneous, may be reversed, tends to prove its conclusiveness whilst it shall remain in full force.

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would be the  
only consequence.

If the judgment on the demurrer in the common law suit brought by Hunt against D. C. Terril, be right, it must be admitted that, if there had been no demurrer, and the jury had found a general verdict in favor of Hunt, the finding should have been set aside. It is equally true, that a general verdict against him would have barred his cause of action. A non-suit could not then have been entered, because he had made his election to try the case on the facts and could not have retracted after the trial and finding against him. There was not a general verdict against him; but the verdict, as rendered, was subject to the judgment of the court on the demurrer, and that judgment, when pronounced, had the same effect as a judgment on a general verdict against him, or on a special verdict (without demurrer) in his favor, would have had.

If, instead of demurring, Terril had moved the court to instruct the jury as in case of a non-suit, and the instruction had been given, Hunt would have been barred by a verdict against him. He could have escaped such a consequence, only by suffering a non-suit before the jury had retired from the bar. Or if, without either a demurrer to the evidence or an instruction to the jury for a non-suit, a verdict had been found against Hunt, (as in such a contingency ought to have been the case,) he could never have evaded the bar by shewing that, inadvertently, a chasm had occurred in his proof. The judgment against him on the demurrer, has precisely the same effect as a judgment on either of the verdicts which have been supposed, or as a judgment against him on a special verdict would have had. The only difference between a special verdict and a demurrer to evidence is, that one admits every allowable deduction from the facts, the other ascertains and reports the opinion of the jury on the same facts. The judgment of the court against the plaintiff is as conclusive in the one case as in the other. If, in the one case, the plaintiff, instead of suffering a non-suit, permits a verdict to be found, a judgment against him on the verdict will, until reversed,

Judgment on either a special verdict, or on demurrer to evidence, is a bar to any future suit on the same cause of action.

If plaintiff desire not to be barred (from another suit on the same cause,) by a judgment on a special verdict or on a demurrer to evidence, he should waive his evidence, and suffer a non-suit.

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bar his action : so, in the other case, if he submit the decision, on the facts, to the court, a judgment against him is equally conclusive. And in either case, he can reserve the chance of another suit on the same cause of action, in no other way than by waiving his evidence, and thus evading a trial.

The consequence seems to be, that, as long as the judgment in favor of D. C. Terril shall be permitted to remain unreversed, no suit at law can be maintained on the same cause of action against the heirs or any of them.

And the judgment must as effectually bar a suit in chancery as a suit at law.

The chancellor cannot revise or reverse a common law judgment. He may not regard, as conclusive, a decree which had not been rendered on the merits. But this judgment must be deemed decisive of the merits. It was rendered against Hunt only because his proof did not authorize a judgment in his favor. A party cannot say that his case was not tried on its merits merely because he had been disappointed in the effect of his evidence, or had ventured to go to trial on insufficient proof. And, hard as the case may seem to be, Hunt has no more cause to complain of severity in the rules of law than any other person would have for complaining that he should be barred by a judgment rendered against him when he was not as well prepared as he afterwards discovered that he might have been. If his case was not tried on the merits, no case ever was so tried, if either party might, by skill, prudence or vigilance, have prepared it more advantageously or securely than it was prepared when he submitted it for trial.

A judgment on the merits which will bar any other suit at law on the same cause of action, will also bar a suit in chancery on the same cause of action.

The judgment against Hunt on the demurrer must be deemed to be a judgment on the merits. It is a bar to any other suit at law on the same cause of action. And in such a case, the maxim, "*equitas sequitur legem*," emphatically and conclusively applies.

Wherefore, however injurious the consequences may be to Hunt, he cannot have another chance of trying the same case in equity or at law. If he be entitled to another trial, when would he be barred?

If, on a second, third or fourth experiment, he shall have failed in consequence of some slip or inadvertence, shall he be heard again and permitted to prosecute suits, *ad libitum*, on the same cause of action? He might have escaped the consequences of the judgment on the demurrer by suffering a non-suit, or by proving all the facts necessary to entitle him to success. As he did neither, and staked his case on the demurrer, his right of action is gone, and the chancellor cannot relieve him.

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Wherefore, the court (Judge Underwood dissenting,) feels constrained to affirm the decree of the circuit court.

*Denny and Breckenridge* for appellant; *Nicholas* for appellees.

### DISSENT.

*Judge Underwood dissenting from the majority of the court, delivered his own opinion as follows:*

Richard Terril, deceased, conveyed a tract or parcel of land to A. and J. W. Hunt, by deed, with general warranty. The vendees of the Hunts were sued in an action of ejectment by the lessee of Joseph Desha. J. W. Hunt united with them in the defence, A. Hunt being dead. Desha's lessee recovered judgment. J. W. Hunt, as surviving vendee of Richard Terril, (who died before the judgment in the action of ejectment,) instituted an action of covenant upon the warranty in the deed against the heirs of said Terril. The writ issued on the 7th of February, 1824, against Martha Terril, Dabney C. Terril, Mary Jane Terril and Peter Carr, who are styled in the writ, "heirs at law of Richard Terril, deceased," returnable to the ensuing March term of the Jefferson circuit court. The declaration was filed on the same day in the clerk's office, but that was against Dabney C. Terril alone, as "one of the heirs at law of Richard Terril, deceased." The writ was executed on Dabney C. Terril on the 9th of February, 1824. At the March term, the return of "*no inhabitant*" as to the other defendants was quashed, and an *alias* awarded. The *alias* issued directed to the sheriff of Jefferson, returnable to the October term, 1824. In this writ,

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the names of Mary Jane Davis and J. A. G. Davis are inserted, and that of Mary Jane Terril omitted. No marriage is suggested on the record. It does not appear that the alias writ was ever placed in the hands of an officer, or that any return was made upon it. At the October term, 1824, the cause was continued without an order renewing the process, and it was continued until the October term, 1825, without any renewal of process; at which term an entry was made abating the suit as to Martha Terril, Mary Jane Terril, Peter Carr and J. A. G. Davis, and a trial had as to Dabney C. Terril upon three pleas. 1st. That the covenant had been kept and performed; 2nd. that the covenant had not been broken; and, 3rd, no eviction, as set forth in the declaration, by title paramount. The defendant demurred to the evidence. The jury found a verdict, subject to the opinion of the court. The plaintiff, Hunt, failed to exhibit a regular chain of title from the patentees to Joseph Desha, thereby shewing, that the recovery in the ejectment was proper on his demise, although an elder grant than Terril's was read in evidence. The court, upon the demurrer, gave judgment against Hunt, which judgment remains in full force.

J. W. Hunt then filed his bill in chancery against John A. G. Davis and Mary Jane his wife, Martha Minor, Dabney C. Terril, Frank Carr, D. T. Carr, Fortunatus Cosby, Isaac Miller and Robert W. Miller, charging that said Mary Jane, Martha and Dabney C. children, and said D. T. Carr, a grand child of Richard Terril, deceased, were his heirs, said Cosby, his administrator, Frank Carr, father of said D. T. Carr, tenant by the courtesey, and said Millers, debtors to some of the heirs, and prayed for a decree to have the damages he was entitled to in consequence of the breach of the covenant of warranty aforesaid satisfied by the heirs, in consequence of the estate descended to them, which is alleged in the bill to be ample, while the assets in the hands of the administrator are charged to have been exhausted. The Millers are called on to account for the money due by them to the heirs. The bill charges, that there are 260 acres of land lying in Jefferson county, owned by the heirs of R. Terril, the same having

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descended from him, and which is sought to be subjected to the payment of the complainant's demand. Martha Minor, J. A. G. Davis and wife, Frank Carr and D. T. Carr, were proceeded against as non-residents. All of them filed answers denying the jurisdiction of the court, relying on lapse of time as a defence, and also pleading the proceedings at law against Dabney C. Terril and judgment in his favor as aforesaid, in bar of the recovery sought. They admit estate by descent sufficient to pay the complainant's demand if he is entitled to recover, and Davis and wife admit the tract of 260 acres to be theirs, the same having been allotted to them in the division of R. Terril's estate. They do not admit that the Millers were indebted to them. They insist that Cosby had not exhausted the personal assets. Dabney C. Terril, the Millers and Cosby make no answer. The circuit court, on hearing, dismissed the complainant's bill, and he has prosecuted an appeal.

I think it entirely clear, that the covenant of warranty has been broken, and that the complainant, now appellant, is entitled to redress against the representatives of Richard Terril, deceased, unless some one of the objections, relied on by the appellees, should be insurmountable.

The first question I shall notice is, that which arises upon the proceedings at law against Dabney C. Terril, as one of the heirs of Richard Terril, deceased. The cause of complaint set out in the bill and declaration is the same, and if the judgment in the common law action be a bar to the relief sought by the proceedings in chancery in this case, other questions need not be considered.

It is a well settled principle of law, that a final judgment or decree deciding the merits of any controversy is conclusive, so long as it remains in force, upon the parties to it, in all subsequent litigation touching the same matter ; and such a judgment or decree may be plead in bar to a recovery in any suit or action instituted for the same cause. Without such a rule as this, litigation would be interminable, and the rights of litigants would never be put to rest. But in order to make the bar, which the law

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allows from a former recovery or acquittal, valid, I deem it necessary for the party relying upon it to shew, that the merits of the controversy have been adjudicated upon, and settled by the court in the case wherein the judgment or decree relied on was pronounced. He must shew that the subject matter of the existing suit has been previously adjudged and finally disposed of, by a competent tribunal, whose decision remains in full force. There are many cases in which this may be conclusively done, by the mere exhibition of the record of the suit which has been disposed of. There are others, in which it might be necessary to introduce parol proof in order to shew what had been concluded by the record. Wherever the pleadings exhibit the points put in issue, and the verdict of a jury, or the judgment or decree of the court, without the intervention of a jury, is responsive to the issue, then all the matters embraced by the issue are settled and concluded, and cannot thereafter be disturbed, except by a resort to some superior tribunal by appeal or writ of error, or by bill of review, or by bill in the nature of a bill of review. But unless the verdict of the jury or judgment or decree of the court, responds to the issue, there can be, it seems to me, no adjudication upon the merits, and, consequently, nothing can be settled so as to constitute a bar in any other cause. The bar does not result merely from the fact that a former suit for the same cause was instituted, and that such suit has been terminated. If that were the reason of the rule, then every non-suit, abatement of an action, or judgment upon a demurrer against a declaration, might constitute a formidable bar to the recovery of the clearest right. The rule seems to be founded upon the consideration that it has been fairly and fully adjudged in a former suit, that the plaintiff or complainant in the record has no such right as he pretends to assert. The case of *Bradley vs. Ord*, 1 Atk. 571, is a strong authority in point. By an examination of the issues there, and an investigation of the manner in which they were disposed of, we shall be conducted to a correct conclusion as it respects the bar relied on.

Issues were found upon three pleas, as already re-

marked, to wit: covenants performed, *non infregit*, and no eviction by title paramount, as set forth in the declaration. Now, it is manifest, that the court gave judgment, upon the evidence, in favor of D. C. Terril, either upon the ground that the plaintiff had failed to shew an eviction by title paramount, as alleged, *because the deed to Desha was not read*; or upon the ground that one of the heirs of Terril could not be proceeded against singly. I cannot, however, 'presume that the court went on this last ground, because the court suffered the suit to abate as to part of the heirs, which seems to imply that the court was of opinion that the plaintiff might proceed against a part of them. But, upon either ground, it is manifest that there could have been no decision destructive of the obligatory force of the covenant or the plaintiff's right to recover damages upon it, when a proper state of facts presented themselves. All that the court could determine upon the demurrer to the evidence as set forth was, that the plaintiff then failed to shew any right to recover upon the covenant of warranty, and not that there never could exist such a right on the part of the plaintiff. In all cases where a demurrer is filed to evidence, it should be spread at large upon the record, or the facts proved, and all those which the evidence conduces to prove, if it be circumstantial, should be distinctly admitted upon the record. II H. Blackstone, 187. This being done in the present case, the grounds upon which the circuit court gave judgment are obvious. There was no evidence whatever sustaining the plea of covenants performed. Indeed, that plea would have been adjudged bad upon demurrer, under the authority of *Young vs. Whitaker and Wilson*, 1 Marshall, 398, and it is difficult to regard that plea as having any effect whatever in the present aspect of this case. The other two pleas have no other effect than to put the plaintiff on the proof of his cause of action as set out in his declaration. That he failed to do, because he did not exhibit the deed of conveyance to Desha. The consequence was, that the plaintiff did not make out his case, and upon that ground the court, upon the demurrer, decided against him. Under the evidence, the plaintiff should have been non-suited, had



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the defendant made the motion. Had that been done, there would have been no pretence for considering the proceeding a bar. But as it was not done, and the plaintiff chose to abide a decision upon demurrer to the evidence, I have felt embarrassed in settling the cause in conformity to the technical rules which seem to be applicable to it, so as to embrace and give effect to the principles of justice which must be outraged, if a recovery is defeated in this case, because of an oversight in not giving in evidence the deed to Desha, which was matter of record. It is clear that the liability of D. C. Terril, upon the covenant of his ancestor, was not decided by the court and he exonerated, by any matter of defence possessing merit. The binding efficacy of the covenant of warranty was not assailed. An eviction from the land was shewn, and a paramount title was exhibited, but then there was a fatal blunder committed in not connecting the eviction with the paramount title. All this is shewn by the record. Can or ought such a record to bar a recovery in another suit when the blunder is cured? I think it ought not. If the ground of decision had not been exhibited by the record, then it might have operated as a bar, because in the absence of the particular reason for defeating the plaintiff, which did not involve the merits, it would be taken that the decision turned upon the merits, and that these were against the plaintiff. But where the record shews that there could have been no decision upon the merits of the controversy, and that there was sufficient reason for deciding against the plaintiff upon some minor point, such as the omission to exhibit the deed in the present case, I cannot admit such a record to operate as a bar and thereby destroy important rights, which thereafter are clearly made to appear. The former decision in such a record should be regarded, when given upon demurrer to evidence, as not concluding the parties any more than a judgment of non-suit, or a judgment against a declaration upon demurrer, or a judgment founded on the verdict of a jury responsive to an immaterial issue. Suppose a debt is bought for \$100, and the defendant pleads immaterial matter; such, for instance, as that the plaintiff was rich and

had no use for the money, or that the defendant was poor and unable to pay, and the jury find the issue on such a plea for the defendant, would a judgment rendered thereon in his favor bar another action? I think it would not, because upon the face of the record it would be manifest that nothing had transpired, which, in law, could shew that the plaintiff had no right. The maxim, "*quod nemo bis vexari debet*," &c. is founded on good reason and wise policy, but we ought to be careful that we do not, by a literal adherence to its apparent injunctions, incur the imputation of running counter to another maxim equally sage—" *qui hæret in litera, hæret in cortice.*"

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The appellees insist that a court of chancery has no jurisdiction in this case. I think there is no weight in the objection. It is averred in the bill, that the administrator has exhausted the assets, that part of the heirs are non-residents, and that there is real estate, by descent, situated in Jefferson county. These things give a court of chancery jurisdiction to reach the non-resident heirs. They can be reached in no other way. Their estate, by descent, is assets in their hands to pay their ancestor's debts. The law denominates it legal assets, for usually it can be reached by a legal remedy; but where that cannot be done, owing to the non-residence of the heir, I think a chancellor may reach the fund which the law subjects, with the same propriety, that he might, if it had been made equitable assets and a trust created by will.

Where there is right, but the legal remedies cannot reach it, the chancellor may extend his arm to aid the party, in many cases, without any statutory regulation, and the present, I think, is a case justifying his interposition. The question of jurisdiction, and that growing out of the judgment at law upon the demurrer to evidence in favor of D. C. Terril, are the only questions which presented any difficulty to granting the complainant relief. Upon the first point, I cannot admit the judgment in favor of D. C. Terril as a bar, because it is clear that he was not discharged by an adjudication upon the merits, and because there is no danger to be apprehended from perjury in another trial, as the additional evidence

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is matter of record. Upon the second point, I think a court of chancery, upon common law principles, has jurisdiction, in a case like this, to reach the assets in the hands of the heirs. I therefore cannot consent that Hunt shall lose \$1500 which he is clearly entitled to. I therefore dissent from the opinion delivered.

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COVENANT.

### Wilson vs. Robertson.

Case 18. Appeal from the Mason Circuit; W. P. ROPER, Judge.

*Writings. Ambiguity. Parol proof.*

November 14. Chief Justice ROBERTSON, delivered the Opinion of the Court.

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ON 13th of September, 1823, John Wilson sold all his pecuniary interest in the estate of Richard Tilton, deceased, to John Robertson, and guarantied its amount to be at least \$700; in consideration whereof, Robertson covenanted to pay Wilson \$250 in Virginia paper on the bank of Richmond, and "\$450 worth of merchantable manufactured tobacco, at twenty cents per pound, delivered in the town of Maysville, on or before the 25th of December, 1823."

On the 21st. of April, 1829, Wilson sued Robertson in covenant, charging as a breach of his covenant, a failure to deliver the tobacco according to his undertaking. On an issue on a plea of covenants performed with leave to prove any fact which might have been pleaded, a verdict and judgment were rendered for Robertson, to reverse which Wilson prosecutes this appeal.

On the trial, the appellee proved that, on the 12th of December, 1823, he deposited, in the warehouse of January in Maysville, 15 kegs of manufactured tobacco, weighing 2,369 pounds, subject to the order of the appellant, but which he refused to receive alleging that it was not such as he was entitled to, and which, therefore, still remained in the custody of January under the original consignment; and

he also proved, that the tobacco thus deposited was "merchantable." But it seems, from the bill of exceptions, that, at the date of the covenant and of the consignment of the tobacco, there were two distinct kinds of manufactured tobacco merchantable in Maysville: one kind, sweated by a forced process in a steam, or swet house, and worth from 5 to 9 cents a pound; the other kind, prepared by the ordinary process without any forced, or artificial sweating, and worth from 12½ to 20, and perhaps 25 cents a pound, and that the tobacco, deposited by the appellee in December, 1823, had been manufactured by the steam process, and was far from being of the quality of tobacco thus sweated. This having been the substance of all the evidence, the appellant moved the court to instruct the jury: 1st. that, unless the tobacco which had been consigned, was worth \$450 they should find for him; 2nd. that the jury had a right to infer from the covenant and the parol evidence, that the parties intended by the terms—"*merchantable tobacco at 20 cents per pound*," such tobacco as was generally selling at 20 cents a pound at the date of the covenant, and that, unless the tobacco which had been consigned was of that class, the jury should find a verdict for damages. The court refused to give either of these instructions, but instructed the jury that if the tobacco was merchantable, the appellant was bound to allow 20 cents a pound for it without regard to its value, or specific kind. The appellant then offered to prove, by a witness who was present when the contract was made, what kind of tobacco the parties intended, when they used the words, "*merchantable manufactured tobacco at 20 cents per pound*;" but the court supposing that such testimony would contradict, or curtail, the legal import of the covenant, refused to allow it. Whether, or not, the circuit court erred in withholding, or in giving instructions, or in refusing to permit the testimony which was offered by the appellant, is the only question presented for consideration.

There is no patent ambiguity in the covenant, its language is intelligible, and, *per se*, imports that 20 cents a pound were fixed as the price at which man-

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*Latent ambiguity may be explained by parol evidence.*

unfactured tobacco, which was merchantable, was to be taken by the appellant in discharge of the covenant, by the appellee, to deliver \$450 worth of tobacco at 20 cents a pound. Therefore, if extraneous facts be inadmissible, the circuit court decided correctly and its judgment is consequently right.

But the parol evidence which was given and that which was offered and rejected were admissible: no fact which was proved, or which the appellant offered to prove is inconsistent with the covenant. These facts can have only one of two tendencies, that is, either to apply the comprehensive and general terms of the covenant to a specific subject matter, or to prove a latent ambiguity, and then apply the words of the covenant according to the actual intention of the contracting parties. The term, merchantable, when applied to manufactured tobacco, may include tobacco not only of various qualities and values, but even of specifically different kinds and classes. When it was proved in this case, that there were two *kinds* of manufactured tobacco which, though both were merchantable, were essentially different not only in quality and value, but in specific denomination and character, should the words of the covenant be still construed as necessarily comprehending all the qualities and values of both *kinds* of tobacco, or may not extraneous proof shew that the parties intended the various qualities and grades of tobacco of the superior *kind*? We are inclined to the opinion, that the latter is the rational and legal interpretation of the contract, when all the facts are considered. It cannot be presumed, that the appellant intended to allow 20 cent a pound for even the best quality of that kind of tobacco which was worth only from 5 to 9 cents. But it would not be unreasonable to infer, that he agreed to allow the maximum, or nearly that for tobacco of the *kind*, which was worth from 12½ to 20, or 25 cents a pound; and this, as we are inclined to think, is the true meaning, and intent of the expressions "\$450 worth of merchantable manufactured tobacco at 20 cents per pound," when considered in connexion with the extraneous facts. Such a restricted application of the comprehensive terms of the covenant may be authorized by principle and authority. See *Starke on Evidence*, 1020-26. *Peish*

vs. Dickson, I. Mason's Reports, 11. Goddard vs. Wilson  
Balow, I. Not and McChord, 45. Cole vs. Wendell, vs.  
VIII Johnson, 116. ROBERTSON.

But it is not material, whether the parol proof results necessarily in the construction of the covenant which we have intimated; for, however, that may be, we are satisfied, that the facts which were proved created a latent ambiguity, and that, therefore, the appellant had a right to prove which of the two kinds, or classes, of merchantable tobacco was intended by the parties to the covenant, but not that any particular *quality* of either *kind* was contemplated. In proving that there were two *kinds* of manufactured tobacco, a latent ambiguity, as to the *kind* intended by the parties, was established. But as there must necessarily be various qualities of the same *kind* of tobacco, there cannot be a latent ambiguity as to the "*quality*" of either "*kind*."

Dissent.

Judgment reversed, and cause remanded for a new trial.

Reid and Hord for appellant; Crittenden for defendant.

### DISSENT.

*Judge Buckner dissenting from the majority of the court, delivered his own opinion as follows:*

My opinion is that the circuit court correctly decided the points presented; and that the judgment ought, therefore, to be affirmed. Upon the most diligent examination of such authorities, as during the pressure of business, an opportunity of consulting has been afforded, I have not found any adjudged case, which, according to my view of it, can support the opinion delivered in this case. It is admitted, that there is not the slightest ambiguity on the face of the covenant, on which the judgment was obtained. It is susceptible of the most clear and satisfactory interpretation; and cannot be distinguished in principle from an ordinary covenant to deliver \$450 worth of any other article, at a stipulated price; say, for example, \$450 worth of corn, at \$1 per barrel, or of merchantable whiskey, at 25 cents a gallon, or of merchantable pork, at \$3 per

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cwt. Of each of those articles, there are various qualities; that is, they possess different degrees of excellence. Why, if parol evidence be admissible to prove the particular quality of the tobacco, which the parties intended should be delivered, might it not be equally admissible, to shew the intention of the parties as to the quality of the articles covenanted to be delivered in the cases supposed. No satisfactory reason can be assigned why it could not, yet no case has been cited; and I suppose, that none can be found, in which its admissibility under such circumstances, has been sanctioned.

In the opinion delivered, it is said, that "the appellant had a right to prove, which of the two kinds, or classes, of merchantable tobacco was intended by the parties to the covenant, but not that any particular quality of either kind was contemplated. I cannot consent to the correctness of the application, here made of the terms, *kind* and *quality*; nor to the propriety of the distinction drawn between them, as applicable to this case. The tobacco covenanted to be delivered, was to be manufactured and merchantable. The mode in which tobacco is manufactured, may affect its quality, or excellence, in its manufactured state, and consequently, its value, but it cannot change its kinds, except so far as the word, *kind* is used as significant of its quality, or the degree of its excellence. In whatever manner it may be manufactured, it might still be merchantable.

There are various modes of cultivating tobacco and of managing it, after it is severed from the ground. These different modes of treating it, produce various hues, and as various qualities, although it may all spring from seed taken from the same stock. Upon a covenant to deliver any given quantity of merchantable tobacco, will it be contended, that parol proof is admissible to shew that the parties to it, intended that the tobacco should have been *cured* by fire, or without fire, or that it should be strong dark colored tobacco best fitted to be manufactured for chewing, or light, yellow tobacco of a quality preferred for cigars? Surely not, and yet the quality and price of the one, and the other description is as

different from each other as the article manufactured with the aid of steam, is from that manufactured without it.

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Dissent.

The doctrine respecting latent ambiguities does not apply to such a case, as the one under consideration, nor can it, in any case be applied, to prove the intended quality of the article covenanted to be delivered.

It is said to be necessarily a matter of extrinsic evidence to apply the terms of an instrument, to a particular matter; the existence of which is also matter of proof.

The terms of the instrument may be sufficiently definite and distinct, yet the objects to which it is to be applied, may not be equally so. In such cases, it is often doubtful, whether the description contained in the instrument, applies to the particular object pointed out by the evidence, or whether it be not equally applicable to several distinct objects.

The general rule is, that a latent ambiguity as to the object intended, (that is an ambiguity arising from extrinsic evidence,) may be removed by extrinsic evidence. Thus, if in a will, the description of the devisee, or of the estate devised, may be applied to either of two persons, of the same name, or to either of two estates. For example, A devised his estate to his cousin John Cluer, and there were two persons, (father and son,) of that name, parol evidence was admitted to shew, that the son was meant, and that of necessity; because otherwise, the bequest would be void for uncertainty. In the case of Peich vs. Dickson, 1. Mason's Reports, 11, Story justice says, he had found himself unsuccessful in every attempt which he had made, to reconcile all the decisions, upon the subject of latent and patent ambiguities: "The difficulty (he remarks,) lies not in the rule itself, (than which nothing can be clearer,) but in applying it to particular cases, where the shades of distinction are very nice. There seems, indeed, to be an intermediate class of cases partaking of the nature of both latent and patent ambiguities; and that is, where the words are all sensible, and have a settled meaning, but at the same time,



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consistently admit of two interpretations according to the subject matter, in the contemplation of the parties. In such a case, I think parol evidence might be admitted to shew the circumstances under which the contract was made, and the subject matter to which the parties referred. For instance, the word freight has several meanings, in common parlance, and if, by a written contract, a party were to assign his freight in a particular ship, it seems to me, that parol evidence might be admitted of the circumstances under which the contract was made to ascertain, whether it referred to goods on board of the ship; "or to an interest in the earnings of the ship, or, in other words to shew, in what sense, the parties intended to use the term."

But conceding that the reasoning of Judge Story is correct, I do not see the force of the attempted application, to the present case. Here there is no difficulty as to the meaning of the term, *merchantable*. It is not susceptible of two different meanings, like the word freight. That is not the ground, upon which the introduction of the parol testimony is attempted to be justified; but it is, because of merchantable tobacco, there is some of quality superior to some others.

To admit it, for such a purpose, would, in my opinion, be contrary to the best established principles of law, and would render the evidence of the contract furnished by the covenant, not at all superior to that, dependent upon the frail recollections, or the often misconceived impressions of witnesses.

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SUMMONS.  
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### Garrison et al. vs. Combs.

Error to the Warren Circuit; BRODNAX, Judge.

*Assignment. Corporations. Seal. Agent.*

November 14. Chief Justice ROBERTSON, delivered the opinion of the Court.

LESLIE COMBS, as assignee, obtained a judgment, by default, against the plaintiffs in error,

on a petition and summons, on a promissory note executed by them to "*The Southern College of Kentucky*," and on which the following assignment was endorsed :

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"We assign the within to Leslie Combs, Agent,  
&c. November 12th, 1829.

*Trustees of Southern College,*  
*by A. W. Graham."*

The assignment of error questions the right of Combs to sue as assignee ; and presents a twofold objection to his right. 1st. That the corporate seal not having been affixed to the assignment, the legal right to the note did not vest in the assignee. 2nd. That the assignment is not in the true corporate name.

1st. It is a general rule, that a corporation, as it is a fictitious or merely legal being, must be identified by its effigy or seal, and that its contracts must be authenticated by its common seal. But this common law doctrine had been relaxed in England prior to the American Revolution. As early as the reign of H VII. it was decided that the bailiff of a corporation could justify without an authority certified by the corporate seal. So in *Manby vs. Long*, III Levins, 107, it was decided that the agent of a corporation might make distress, although his appointment had not been authenticated by the corporate seal. In *Rex vs. Rig*, III Pr. Wms. 419, it was decided that a corporation might, by a corporate act certified by its record and without its seal, appoint an agent, whose acts, within his prescribed sphere, would be obligatory on the constituent. The same principle, with extended application, has been established by the Supreme Court of the Union—see *The Bank of Columbia vs. Patterson*, VII Cranch, 299 ; *Fleckner vs. U. S. Bank*, VIII Wheaton, 338 ; *Osburn vs. U. S. Bank*, IX Ib. 738, and *U. S. Bank vs. Dandridge*, XII Ib. 64—and has also been recognised in various shapes, by many of the state tribunals—see I N. H. Rep. 26 ; I Pickering, 297 ; III Halstead, 182 ; III Serg. and Rawle, 16 ; XII Ib. 312 ; I Not. and McChord, 231 ; VI Mass. Rep. 40.

It is a general rule that the contracts of a corporation must be authenticated by its common seal.

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A corporation, which acts through the intervention of a board of directors or managers, and keeps a register of its acts, may be bound by its record without the annexation of a common seal. Its acts are identified and authenticated by its own corporate registry which it should be estopped to deny or impeach when genuine and authoritative, 1 Salk. 191. In this particular the American corporations are unlike most, if not all, of the common law corporations—the former being represented, generally, by a board of directors who keep a record of their proceedings—and the latter seldom or never thus acting; and hence, however rigidly the ancient practice may have required a seal to all the acts of common law corporations, the same reason does not, with equal force, apply to modern corporations such as that of “The Southern College of Kentucky,” whose record may be as authentic and as effectual for ordinary purposes as its seal—see 11 Kent’s Com. 2334–5.

Having thus referred to some of the British and American adjudications which have relaxed the ancient rule requiring the corporate seal, this court will not now determine how far it will recognise and apply the modern cases. They have been cited, merely to shew that the rule which requires the seal is not and cannot, justly and reasonably, be universal in its application.

In this case the authority of the agent has not been disputed. There can be no doubt that a corporation may appoint an agent and be bound by his acts. It was not necessary for Combs to prove or aver that the agent who assigned the note was regularly appointed and derived competent authority from a power under seal or on record. It was not necessary to prove the authority of the agent, unless the assignment had been impeached by plea. The authority of the agent being thus admitted, it is not material how it was or ought to have been delegated.

A corporation may appoint an agent and be bound by his acts.

But it may be supposed that, as Graham had authority only to subscribe the name of the corporation to the assignment, and could not assign the note in his own name, the assignment can have no more

effect than it would have had if it had been made by the trustees themselves precisely as it was made by their agent in their name ; or, in other words, that the annexation of the corporate seal was as necessary as it would have been if the corporate name had not been subscribed by an agent, but had been signed by the corporation itself ; and that, consequently, there being no seal to the assignment, the legal title did not vest in the assignee. There is much plausibility, if not solidity, in this idea : but we are disposed to consider it more specious than sound. A seal is not essential to the effectiveness of an assignment of assignable paper by a natural person in his own right. A seal could, then, be required in this case, if necessary at all, only because the assignment was, in effect, the act of a corporation. But the only reason why, in ordinary contracts by a corporation, the corporate seal is necessary is, because, as a corporation is an ideal existence created by law, and compounded, when aggregate, of a plurality of natural persons, it is known by its common seal which represents and identifies it. Therefore, if it be conceded that the seal would have been indispensable if the assignment had been directly by the corporation itself, it would not necessarily follow, as a legal or rational consequence, that the assignment by the agent without a seal had no legal operation. It must be admitted that the authority of the agent was unexceptionable, and that, therefore, it was authenticated by the corporate seal, if the seal were necessary, (and if it were not necessary to the power of attorney, it was not necessary to the assignment.) If, then, the College had delegated to Graham competent power to assign the note, its act authorizing the assignment, was sufficiently authenticated and identified to be obligatory upon it. If its seal were necessary, it had been affixed. Must it be reannexed to the assignment ? Is such repetition required by the reason of the law ? Suppose that the power of attorney, authenticated by the corporate seal, had been endorsed on the note, would not the assignment, as made, and succeeding the power, be effectual without a repetition of the seal ? Would not the assignment have then been as effectual as it would have been if the corporation, instead of au-

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In a suit by assignee of a note which has been assigned to him by an agent of obligee, it is not necessary to prove the authority of the agent, unless the assignment be impeached by plea.

In suit by assignee on a note assigned to him by an agent of a corporation without the seal of the

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corporation  
being affixed  
to the assign-  
ment, decid-  
ed, that as  
the assign-  
ment was not  
indispenched by  
plea, it vested  
the legal  
title to the  
note in the  
assignee and  
authorized  
him to sue in  
his own name.

A corporation  
may assign a  
note by an  
entry to that  
effect in its  
registry.

An agree-  
ment, to the  
validity of  
which a seal  
is not essen-  
tial, signed  
by "A B  
agent for C D"  
is, in effect  
and by con-  
struction of  
law, the a-  
greement of  
C D.

But an agree-  
ment signed  
"A B for C  
D" is the a-  
greement of  
A B.

To pass from  
a corporation  
its interest in  
a promissory  
note it is not  
indispensa-

thorizing an agent to act, had substituted an assign-  
ment for the power of attorney? In either case the  
seal would have appeared and authenticated the as-  
signment as the act of the corporation. And we are  
not able to perceive why this should not be sufficient.  
If it would be sufficient in the case supposed, the  
seal was not necessary to the assignment which was  
made ; because if the seal were necessary, the affix-  
ation of it to the power of attorney, must be taken  
for granted in this case, as the authority of the agent  
has not been questioned by plea.

But might not the corporation have transferred  
the legal right to the note by a simple entry to that  
effect in its registry ? We suppose that such an as-  
signment might have been made, or that the author-  
ity to the agent may have been vested by such an en-  
try. The corporate seal was not necessary, there-  
fore, to the authority of the agent, nor to the effect-  
iveness of an assignment by the College, without the  
intermediation of an agent.

It must be admitted that an agent may bind his  
principal by an agreement without seal, and signed  
by himself as an agent. An agreement, to the valid-  
ity of which a seal is not essential, signed by "A  
B, agent for C D," is, in effect and by construction of  
law, the agreement, not of A B, but of C D. Such  
an agreement differs materially from one signed by  
"A B for C D," the latter being considered the  
agreement of "A B" to do something for A B, and  
the former an agreement by C D himself.

In *The Columbia Bank vs. Patterson* it was decid-  
ed, that all parol contracts made by an agent of a  
corporation, within the scope of his authority, will  
be binding on the corporation. An assignment of a  
note is, technically, a parol agreement. It is not cer-  
tain that writing is essential to the effectiveness of  
such an assignment. But even if it be so, a seal is  
not necessary ; and an assignment without seal is not  
a specialty.

The foregoing considerations seem, in our opin-  
ion, to authorize the conclusion that the corporate  
seal is not necessary to pass from a corporation its  
interest in a promissory note, especially when the

assignment is made by a duly authorized agent. Besides, we are of opinion that, if an agent, within the sphere of his power, shall, in his constituent's name, by writing without seal, or without writing, make a contract or agreement which would have been obligatory on himself, if it had been made in his own name and in his own right, it should be equally as binding on the principal—See *II Kent's Commentaries*, 235.

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bie that the corporate seal should be affixed to the assignment.

Moreover, it seems to us, that either a seal to the assignment was not necessary, or a corporation cannot assign a note by the intervention of an agent. One, and perhaps the chief motive for appointing an agent is the inconvenience of affixing the corporate seal to every agreement executed, or executory, which he may make. It would be extremely inconvenient for the agent of a corporation to carry, withersoever he might go, the corporate seal. Such an inconvenient ceremonial ought not to be required, unless sound reason or good policy requires it: and neither the one nor the other seems to exact such parade of form and ceremony. The agent having sufficient authority, the corporation is bound by the assignment. It might be sued on his agreement—*Shipley vs. Mechanic's Bank*, X Johnson, 484. We cannot, therefore, perceive how the plaintiffs in error should have any right to complain that there was no seal to the assignment. And we conclude that the corporate seal was not necessary to vest the legal right in the assignee.

If an agent within the sphere of his power do, in his constituent's name, by writing without seal or without writing, make a contract which would have been obligatory upon himself, if made in his own name, will bind his principal.

Judge Underwood is of opinion, that the foregoing view is inconsistent with the case of *The Frankfort Bank vs. Anderson*, III Marshall, 1; and of *Long vs. Hemp Company*, I Marshall, 105.

2nd. The second objection is equally untenable. Enough appears, *prima facie*, to identify the assignor with the obligee, Chancellor of Oxford's case, X Coke, 57, b. or, at least, enough does not appear to shew that they are necessarily different persons.

Judgment affirmed—Judge Underwood dissenting.

*Mills and Brown* for plaintiffs; *Combs* for defendant.

Covenant. **The Commonwealth for use &c. vs. Straton, &c.**

Case 20.

Error to the Adair Circuit; MONROE, Judge.

*Executions, precedence of. Levy. Sheriff.*

November 14. Judge UNDERWOOD, delivered the Opinion of the Court.

THIS is an action of covenant founded on the official bond of Straton against him and his sureties. The breaches assigned are in substance, that two executions issued on the 3rd of March, which, on that day, were placed in the hands of one of Straton's deputies for collection. These executions were against Alexander Gill, Wm. Patterson and H. M. Gill, the two last being but sureties for the former. That the deputy, on the 5th of March, received other executions which issued, on that day, against the estate of Alexander Gill. That while all these executions were in full force in the hands of the deputy, Alexander Gill, at the request of his sureties, Patterson and H. M. Gill surrendered property for the satisfaction of the executions against the sureties, and required the deputy to levy the executions against the sureties on the property thus surrendered. That said deputy in violation of law levied the executions which issued, on the 5th, upon the property given up for the benefit of the sureties, and gave the executions so levied a preference over those which issued on the 3rd, and which came to his hands first. That the deputy after levying the executions against the sureties upon some personal property, illegally permitted a constable to take it and dispose of it. That, in consequence of the illegal acts of the deputy in permitting the property of A. Gill, which should have been applied in satisfying the executions against the sureties to be disposed of otherwise, Wm. Patterson had been compelled to pay off one of the executions, and H. M. Gill had been compelled to pay off the other out of their own estates to their great injury, &c.

The defendants demurred to the declaration, and the court gave judgment in their favor. To the form of the declaration we perceive no objection. It contains every averment necessary to present the mat-

ter relied on fully. The decision of the demurrer must turn upon the facts. In behalf of the defendants, two grounds are assumed: 1st. that the facts averred being true, do not shew any liability on the part of the defendants to the relators, and 2nd if there be any liability, it is separate and not joint; and so the relators have misconceived their action by uniting. Upon the first point, it is contended, that the law providing that an execution shall bind the defendants' property from the time of its delivery, and requiring the execution first delivered to be first satisfied &c. was designed for the benefit of the plaintiffs in the execution alone, and if disregarded by the officer, no one can be injured, provided the plaintiff's debt is made. In addition it is urged, that the claim of the relators against A. Gill, is in dignity not higher than a simple contract and that to permit their success in this case; would be to give them a preference over judgment creditors whose executions must have remained unsatisfied, but for the course taken by the deputy sheriff. The 8th section of the act to amend and reduce into one, the execution laws approved 12th February, 1828, provides that no writ of execution shall bind the estate of the defendant, but from the time of its delivery. For the better manifestation of said time the officer is required to endorse the day of the month, time of day and year when the writ is received; "and if two or more writs of execution in favor of different parties against the same person shall be delivered to the officer upon the same, or different days that which came first to his hands, shall be satisfied first." Here is a very plain rule for the observance of officers laid down. It is unquestionably their duty to obey it. But if they do not, then it is insisted, no one can complain, unless he be plaintiff in the execution first delivered, and which has, in violation of the rule, been postponed. Why restrict it to plaintiffs in execution? There is nothing in any act of assembly which gives such a limitation, in express terms, to the officer's responsibility: nor can we discern the principles upon which, by construction, we can decide in favor of such a limitation. The sheriff is required to covenant in his bond of office, that "in all things he will truly and faithfully execute and

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When two or more executions in favor of different parties against the same person, shall be delivered to the officer at different times it is his duty first to satisfy that which first came to his hands.



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—————

perform his office according to law," and "any person injured by a breach of the condition of his bond, may prosecute a suit thereon and recover damages."

II Digest, 1133. Under these provisions, the only questions in fixing the sheriff's liability seem to be, first, has he violated any condition of his bond, and second, has the relator been injured by it? If the bond has been violated, yet if there has been no injury to the relator, he must fail in his suit. It might, therefore, be conceded, that if A. Gill had instituted this suit, because the rule for satisfying the execution against him, had not been observed by the sheriff, he could not recover in any event more than nominal damages, if that: for if his property went to pay his just debts, the order in which they were paid, could be to him no more than a matter of conscience and feeling, and to remunerate his chagrin in not being permitted to discriminate and shew favoritism among his creditors, could not be done by any standard known to the law. But this, we conceive, is a very different thing from that of making

if an officer who holds an older and junior execution, in his hands, shall levy the junior execution first, and by the satisfaction of it first, shall so exhaust the property that there shall not be sufficient to satisfy the older execution, and in consequence thereof the older execution is satisfied out of the estate of the surety of the defendant in the older execution, the officer is liable in a suit on his official bond, for the injury

individuals liable for a debt, and ultimately compelling them to pay it; when, if the rule prescribed for sheriffs had been observed, no such burden would have fallen on them. If the executions first delivered had been satisfied first as the law directed, the relators would have been entirely discharged from responsibility; but A. Gill would still have remained bound for whatever sum, his property could not pay, and this, in respect to him, must have been the case in every event. The consequence resulting is, that he could not be injured. But the injury to the relators is striking; if the sheriff does his duty, they pay nothing; if the sheriff violates his duty, they are made to pay. This to them as sureties, if their principal is insolvent, is as grievous as it would be, were the sheriff to take their property under color of his office to satisfy an execution in which they were not bound. It is in either case, the loss of so much estate both proceeding from the wrongful acts of the officer, and we cannot see why good policy and sound morality, should not, in both instances alike, hold him answerable. It is asked, shall the sheriff be bound to know who is principal, and who

is surety in an execution? We answer, he is not; but he is bound to do his duty "according to law." If he fails, he risks all consequences, and cannot thereafter excuse himself upon the ground, that the process did not point out his danger. If the sheriff, or his deputy, had levied the executions first delivered on the property of the sureties, it is probable, they might have protected it to some extent, if not entirely under the provisions of the 35th section of the aforesaid act of 1828. But it is deemed unnecessary to investigate the point now, how far the property of the principal could be substituted as matter of right to save that of the surety. No levy seems to have been made on the estate of the sureties until after the sale of the property of the principal, and the application of the proceeds to the payment of the junior executions.

Permitting the constable to take off a part of the property levied on by the sheriff, he having made the first levy, was likewise a violation of the condition of the bond. The officer holding the oldest execution, is not entitled to take property out of the hands of another officer who has made the first levy, although it be in virtue of a younger execution.

We do not perceive the weight of the arguments founded on the relative dignity of the debts, or claims, in behalf of the relators against A. Gill, and those of his judgment creditors. The rule which directs executors and administrators to respect the dignity of debts cannot operate in the application of the rules prescribed by statute for the government of sheriffs to the facts of this case. We are, therefore, of opinion, that the declaration contains averments of facts which shew that the relators have been injured by the conduct of Straton's deputy, and for which they are entitled to a remedy on the official bond.

Upon the second point we are divided in opinion. The Chief Justice thinks that the relators have sustained that kind of an injury for which they may unite in the present action, or sue severally. Judge Underwood is of opinion, that their injury is altogether several, and that they cannot sue jointly.

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STRATON &c.

thereby indicted on the surety in the older execution.

If a sheriff after he has levied on property permit another officer to take it off (in satisfaction of other executions,) he violates his duty, and his official bond.

The officer holding the oldest execution has no right to take property out of the hands of another officer who has made the first levy, although made in virtue of a younger execution.

ARBUCLE                    Wherefore, the judgment must be affirmed with  
                                  vs.                    COSTS.  
 HADEN, &c.                *Mills and Brown* for plaintiffs; *Monroe* for defend-  
                                  ants.  
                                  Absent Judge Buckner.

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DETINUE.

CASE 21.

**Arbuckle vs. Haden, &c.**

Error to the Todd Circuit ; BRONNAX, Judge.

*Deed. Will. Provisions for after-born children.*

November 14.                Judge BUCKNER delivered the opinion of the Court.

THIS was an action of detinue prosecuted in the year 1828, by G. S., Nancy H., James L., Sibellas W., Sally Ann and Mary Jane Haden, infants, by James C. Haden, their next friend, against Thomas Arbuckle, to recover a female slave, Betsy, and her four children.

Upon the plea of non-detinet, a verdict was returned, and judgment thereon entered against Arbuckle, after a motion for a new trial, submitted by him, had been overruled. To reverse it, this writ of error is prosecuted.

We shall notice such points, presented by the assignment of errors, as are deemed to be of any consequence.

Anthony Hayden, the paternal grandfather of the infants, it is admitted, was once the owner of the slaves in contest. Nathan O. Haden, son of said Anthony, and father of the defendants in error, sold the slaves, and delivered them to one Hopkins. Anthony Hayden, who insisted that he had only lent them to his son, and who, therefore, had no right to sell or otherwise dispose of them, instituted an action against Hopkins, to recover them. While that action was depending, on the 28th of August, 1828, he conveyed them, by deed of gift, to the five first named plaintiffs, who were all of the children then in esse of said N. O. Haden ; which, by its terms, was not to take effect until after the decision of that suit. It contains the following clause :

“ And it is to be further understood, that whereas I am informed, a marriage is contemplated to be had, in some short time, between the said Nathan O. Haden and a certain Ann Porter, the daughter of my old friend ; now, should this marriage take effect, it is my determination that the children or issue of said marriage, if any, shall be equal sharers in my bounty ; and I do therefore, by these presents, make said children of said marriage equal in interest in the negroes herein heretofore conveyed, given and granted, to my aforesaid grandchildren, with this express reservation, that during the life of said Ann Porter, if the marriage between her and the said Nathan O. Haden shall be consummated, the said negroes and their increase shall be and remain with her, to wait upon and serve her ; unless my son Nathan O. shall die leaving her a widow, and she shall thereafter marry ; and upon the happening of this event, if it shall ever happen, then it is the intention of this conveyance, that such of my grandchildren herein before named, as may be living, and such as shall be produced, by the said marriage, shall have the right to the immediate possession,” &c. of said slaves.

ARBUCKLE  
vs.  
HADEN, &c.

The suit referred to was not tried, as Hopkins and N. O. Haden rescinded their contract, and the possession of the slaves was yielded, without further contest.

In December, 1827, Anthony Haden made his last will and testament, in which he mentions and confirms the deed of August, 1828.

The anticipated marriage took place, and the sixth and last named plaintiff was the issue of it. She was born after the death of her grandfather, A. Haden, which occurred in 1828.

In November, 1827, the slaves in controversy were levied upon and sold by the sheriff as the property of N. O. Haden, under executions against him, and were purchased by the plaintiff in error, who, on the trial of this case, relied on his title so derived, and attempted to shew, by testimony, that they had been in the continued possession of N. O. Haden from the year 1819, and were consequently subject to the executions, under which he purchasd.

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vs.  
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1. On the part of the defendants in error, proof was introduced, conducing to shew, that the possession of N. O. Haden had not been uninterrupted during the time named ; and that whilst he kept possession of them, he held under his father.

When the defendants in error had closed their evidence, Arbuckle moved the court to instruct the jury, as in case of non-suit ; but the motion was overruled ; and he excepted.

The propriety of that decision presents the first point necessary to be considered.

It has been insisted, 1st, that should it be even conceded, that Arbuckle acquired no valid title under his purchase, and that the slaves can be recovered from him ; Nathan O. Haden and wife, who are still living, could alone maintain an action for that purpose.

2nd. That should that position be incorrect, there was, nevertheless, a misjoinder of plaintiffs, the daughter of Nathan O. Haden, by the last marriage, not having been born at the death of A. Haden, and that, therefore, she could not have acquired any interest in the slaves, under the deed or will of her grandfather.

In determining upon the first position assumed, it should be remarked, that the deed and will convey the title to the slaves, not to Mrs. Haden, but to the defendants in error. In the deed it is declared, that it should not take effect until the slaves were recovered from Hopkins. When he gave them up, the title of the grandfather passed to his grandchildren, and the marriage of N. O. Haden with his present wife did not divest it. The slaves were to remain with Mrs. Haden to wait upon and serve her during life, unless the contingency, mentioned in the will, should happen ; but there is nothing in either of the instruments of writing referred to, from which it can be rationally inferred, that A. Haden intended the title to the slaves should vest in her. Indeed, it is provided, that if the marriage alluded to should take place, the gift and conveyance were intended for the sole benefit of such of the children of his son Nathan as were then living. And should Mrs. Ha-

den survive her husband and marry again, that such <sup>ARBuckle</sup> of the grandchildren of the grantor as were living at the date of the deed, and those which might be <sup>vs.</sup> born of the contemplated marriage between his son and Ann Porter, should have (not the title to the slaves, for that had already been conferred,) but the right to the immediate possession of them. It may well be doubted, whether Mrs. Haden and her husband would have any right to sell her interest in, and deliver the slaves to any other person. The proper construction of the deed seems to be, that although she might, by her marriage with N. O. Haden, acquire a limited interest in the labor of the slaves, the title vested absolutely in others. HADEN, &c.

As to the ground, that there has been a misjoinder of plaintiffs, we are satisfied there is nothing in it.

Provisions both by deed and will for after-born children are quite common; and no reasonable doubt can be entertained of the propriety and validity of such provisions. We are, therefore, of opinion, that the circuit court properly refused to instruct the jury, as in case of a non-suit. <sup>Provision for after-born children may be made either by deed or will.</sup>

We are also satisfied with the opinion of that court in overruling the motion for a new trial. The testimony was such as rendered the matter the proper subject for the determination of the jury, and whatever might be our impressions with respect to the weight of it, on the one side or the other, is a matter of no consequence in the decision of the question, because it was evidently not such as to justify the court in setting aside the verdict.

The judgment must be affirmed, with costs.

*Crittenden* for plaintiff; *Mills* and *Brown* for defendants.

**ASSUMPSIT. Madison's Executors vs. Wallace's Executor.**

**Case 22.** Error to the Woodford Circuit; W. L. KELLY, Judge.

*Assumpsit. Indebitatus count. Money had and received. Proof.*

**November 15.** Judge UNDERWOOD, delivered the opinion of the Court.

THIS is an action of assumpsit instituted against the defendant in error, by the plaintiffs.

The declaration contains two counts. The first is the common *indebitatus* count for money had and received, and for money paid and advanced. The second is a special count, in substance setting forth the following facts as the basis of the assumpsit, to wit: that the testator of the defendant, by a decree of the general court, recovered against the executors and heirs of Thomas Madison, deceased, the sum of \$5,000, and costs of suit, amounting to \$81 07; that the testator of the defendant devised the benefit of this decree to William Logan, that the plaintiffs in error paid the amount of said decree to Logan, and that afterwards, upon the prosecution of a writ of error, the decree of the general court was reversed. In consideration whereof the defendant assumed, &c.

A demurrer was filed to the second count, and thereupon the court gave judgment against the count. Whether the court erred in this decision is the first question we shall notice.

We are of opinion, that the count is defective in not averring that the payment to Logan was made with the assent of Wallace's executors, or one of them. It does not appear from any averment that Madison's executors or heirs were compelled, by process of execution, to pay the amount of the decree. If they, as volunteers, paid money to Logan which should legally pass through the hands of Wallace's executors, his estate is not liable. It is clear, that the amount of the decree was a fund which should pass to the executors of Wallace as assets, and that the devisee would not be entitled to it without their assent. According to law, therefore, the decree should have been discharged by making pay-

ment to the executors of Wallace, unless they consented that the devisee might collect it ; and hence, if Madison's executors or heirs volunteered in paying the devisee without the assent of one of Wallace's executors, his estate is not liable. It does not appear from the count, that Logan was one of the executors of Wallace. Hence, no inference in support of the count can be drawn from that fact, which was made to appear in proof. We do not intend to be understood that the count would be good, if the averment had been made that the money was paid with the assent of the executors of Wallace. A part of the court incline to the opinion, that the count would not be good, unless it averred that the money had been collected by coercion of law, and, therefore, we shall express no opinion on this point, satisfied that the count is defective as it stands.

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EX'RS  
VS.  
WALLACE'S  
EX'RS.

To the first count, the defendant pleaded *non-assumpsit and non-assumpsit within five years*. Upon these pleas issues were formed and a trial had. The court, upon the evidence, instructed the jury to find as in case of a non-suit, and the jury found accordingly. To decide whether the court erred in giving this instruction will dispose of the case.

It appeared in evidence, by the will of Caleb Wallace, that William Logan was appointed one of his executors, and that he qualified, that the devise was to Logan and wife, she being a daughter of Wallace ; that Logan, on the 5th of January, 1815, by a written receipt, acknowledged the payment of \$3,840 in part of the decree, which payment was made in land, and that Logan, on the 19th October, 1818, by another written receipt, acknowledged, that, with the "*payments heretofore made,*" and John Smith's note for the balance, that day executed, he had received full satisfaction for the decree against Madison's executors and heirs, which Wallace bequeathed to him and his wife. It appeared from the record read in evidence, that after the decree had been thus paid, it was reversed, upon the merits, by this court. The foregoing is the substance of all the evidence which can bear upon the propriety of the instruction given by the court. We are of opinion, that the instruction was correct.



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EX'RS  
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EX'RS

Action for money paid, laid out and expended for the use of the defendant, will not lie unless the plaintiff has actually advanced money.

An action for money had and received, must be supported by proof that the defendant has actually received money to the plaintiff's use.

But there are cases where money is considered as received or advanced when it is not actually done.

Taking the two receipts together, they shew that the whole amount of the decree was discharged by paying land and a note on John Smith. It is possible that there may have been a payment made between January, 1815, and October, 1818, and if so, that it was made in money; but there is no ground for such a presumption. Even if such a thing could be presumed, it is impossible to say whether one dollar or a thousand were paid in money, or whether the whole of any payment which may have been made between the dates of the receipts, was made in property. The question, therefore, is, whether proof of a payment made in land and a note of hand can, in this case, support the count for money had and received, paid and advanced. We are of opinion that it cannot. It should be borne in mind, that by the reversal of the decree, it was determined that Madison's executors and heirs did not owe Wallace the \$5,000 which the general court decreed against them. That decree cannot, therefore, after its reversal, be relied on as evidencing a debt. It may, in connection with other facts, shew what the parties thought at the time the land was conveyed and Smith's note executed. But the reversal proves that Madison's executors and heirs were not in reality indebted to Wallace, notwithstanding the opinions of the parties to the contrary. We perceive no ground, therefore, upon which we can apply the principles settled in the case of *Gray vs. Gray*, decided during the spring term, 1829, and similar cases, in sustaining this action. Can land and cash notes conveyed and executed in discharge of a supposed debt, when none in reality exists, be regarded as money paid and advanced? The mere giving of a bond for the debt of another is no payment, and an action for money paid, laid out and expended for the use of the defendant, will not lie, unless the plaintiff has actually advanced money. *Cummins vs Hackley and Fisher*, VIII Johnson, 202. An action for money had and received, cannot be maintained without proof that the defendant had actually received money to the plaintiff's use before the action was brought. II Dallas, 242. See, also, *Chitty on Contracts*, 178. The authorities use the terms, *actually received or advanced money*. There are

cases where money is considered as received or advanced, when it is not *actually* done. This case is not one of that description. We are, therefore, of opinion, that the land and cash note cannot be regarded as money had and received or paid and advanced.

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Wherefore, the instruction was correct, and, consequently, the judgment must be affirmed, with costs.

*Denny, Mills and Brown* for plaintiffs; *Crittenden* and *Haggin* for defendants.

### Neal vs. Durrett.

COVENANT.

Error to the Henry Circuit; DAVIDGE, Judge.

Case 23.

*Commonwealth bank notes. Judicial knowledge. Reversal.*

November 15.

*Per curiam.* The judgment of the inferior court, in this case, must be affirmed.

### PETITION FOR RE-HEARING.

*Thomas B. Monroe, of counsel for the plaintiff in error, filed the following petition for a re-hearing:*

It is presumed the court has, from some cause, misapprehended this case.

Durrett declared against Neal, in covenant broken, in these words :

“ William Durrett complains of Lewis Neal in custody, &c. of a plea of covenant broken ; for that, whereas, on the 1st day of May, 1824, at the circuit aforesaid, the said defendant, by his certain writing obligatory, signed with his own proper hand, and now here to the court shewn, the date whereof is the day and year aforesaid, bound himself to pay I. Henderson \$100, in notes on the Bank of the Commonwealth of Kentucky, in twelve months then next ensuing the date of said obligation ; which obligation, on the 25th July, 1824, at the circuit aforesaid, then being unpaid, the said Henderson assigned

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to John Cowan, who afterwards, to wit, on the — day of —, in the year —, at the county and circuit aforesaid, assigned the same, it being then unpaid, to the plaintiff, of which several assignments the defendant had full and sufficient knowledge, at the times and places they were respectively made; yet the plaintiff avers, that the defendant has not kept his covenant, but the same has broken in this, that he failed to pay the plaintiff the said sum of \$100, in notes on the Bank of the Commonwealth, in twelve months after the 1st day of May, 1824, agreeably to his undertaking, although thereunto after requested; but the same to pay, hath hitherto failed and refused, and still doth fail and refuse; whereby the plaintiff hath sustained \$200 damages, for which he sues," &c.

Neal was summoned, but not appearing, a judgment was taken against him by default; and a writ of enquiry of damages being awarded, the jury, on the 13th March, 1825, assessed the damages to the sum of \$105, equal to the principal and interest, casting off the few odd days, which would not have amounted to twenty five cents,) and for this sum judgment was rendered in lawful money, and costs.

Neal prosecutes his writ of error in this court; and assigns for error—

1. That the declaration is insufficient.
2. That the damages assessed by the jury, and for which the judgment is rendered, is excessive.

The court have said—

"Justice has been done, and no principle violated; wherefore, the judgment is affirmed."

It is not proposed to re-examine the declaration. I have set it out at full length; if it be good, let it stand for a precedent. But on the other error, it is confidently believed, the judgment would have been reversed, and the cause remanded for a new trial, in which Neal might be enabled to shew, he did not owe one cent of this demand.

The declaration was not endorsed, that bank notes would be received for the demand; and the judg-

ment is for lawful money of the U. States; and, therefore, the amount of verdict and judgment ought not to have exceeded the value of the notes on the Bank of the Commonwealth, on the 1st day of May, 1825, with interest up to the 13th March, 1826. On the 1st May, 1825, the Bank notes were worth just fifty cents per dollar; so that the amount of the plaintiff's damage was fifty dollars on the day of the breach of the covenant, on which the interest for ten months, (odd days cast off,) was two dollars and fifty cents; and the plaintiff was, consequently, entitled to recover \$52 50 cents, exactly half the sum which was in fact recovered.

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*This is the manifest error complained of—that the damages are double.* Neal appears to have lost exactly as much by the excessive damages, as Durrett would have lost had he failed to recover at all, if the half, erroneously added, be equal to the half that might have been legally recovered.

The court cannot know that Durrett did cause his execution of this judgment to be endorsed, that the bank notes would be received, for several reasons. First, because, if there are such writings, executions, endorsements and sheriff's returns thereon, found in the transcript, they are no part of the record, and cannot be noticed. This is directly proved by the case of Shield's heirs against Butts, J. J. Marshall's Rep. —, and the order book, page —, in which this court were so clearly of opinion that the executions and other such proceedings, subsequent to judgment, were no part of the record of the case brought up here by a writ of error to the judgment, that the court did unanimously condemn the record because it contained the executions. That record was made by the same clerk who made the present transcript. It would be hard for my client to lose his cause because his transcript contains the same improper matter which lost the same clerk the price of the record in Shield's case.

Second. The record required by the writ of error, does not extend beyond the judgment; and the court has no assurance that the record is complete farther than that—therefore, the court does not know but the executions and returns, found in the

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transcript, were all quashed, and the specie collected; or it may yet remain due.

But I care not how this may be. The law is, that the endorsement on the execution did not cure the error in the judgment. If I recover horned cattle, when I ought to have recovered horses, I cannot cure the error by endorsing. I will receive the horses on the execution. If I recover double the sum I am entitled to, I cannot cure the error by saying on my execution, I will receive depreciated bank notes, or one half the sum.

It would be idle to reason on this matter. No law is plainer. And if any law be obligatory, this must be; and to disregard it, must *violate principle*. And courts of law can have no rules to administer *justice* upon but rules of the law. When cases are decided by any other rule than the law of the land, a greater injustice is done than the parties to the controversy can suffer. The principles of the government are violated, and injustice is done the constitution of the republic; and the adjudged amount is of no consequence. But suppose we confine the matter to the individual case. It is neither just or lawful that the creditor should have an appreciation of 50 per cent. on the paper, and 6 per cent. on the amount.

It has been so often held, and in such solemn terms, by this court, that it was bound to take judicial notice of the depreciation of the notes on the Bank of the Commonwealth, that I had supposed it was settled for law.

There is some intimation in the opinion of the court on the petition for the re-hearing in the case of Moore and Sharp, that it could not know *exactly* the depreciation at any *certain* time; and something was said, in delivering the opinion in this case, about the fraction the damages assessed lacked of the full amount of the principal and interest.

But, to use the language of the court in the above cited opinion, "if the court know anything about Commonwealth's paper," they must know, that in 1825, when the covenant fell due, it was worth but a half of its nominal amount, and that it never was,

at any time before this judgment was rendered, within ten per cent. of its nominal value, much less within one fifth of one per cent. of its nominal amount. If we know anything, we know that the people of Kentucky never count a fifth of one per cent. off currency, and that in such cases as the present, nothing is more common than to cast off the odd days and cents.

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In short, the court knows that the twenty one cents, which the verdict and judgment in this case lacks of the full amount of the Bank paper, valued as gold and silver, with the interest on it, was not the result of a deduction for the depreciation of the paper, (one fifth of one per cent. !!) but was the consequence of the exclusion of the few odd days in March. And it is impossible for us to wink so hard as to be blind to the fact.

It can never be believed that this court reversed the six cases of Moore and Sharp by which my client lost about \$100 and costs, because the Bank paper was not scaled, when it was not known that the depreciation exceeded one fifth of one per cent., or ten cents in all the cases.

- The court did not interfere in those cases, because the judgments may have been, each of them, ten cents too high, and it cannot be necessary to press this matter in this point of view.

If I know anything about this judicial knowledge, I must know both injustice has been done and principle violated in this case.

## RESPONSE.

*To the petition for a re-hearing, Judge Underwood delivered the following response of the court :*

There is no solid objection to the declaration. It avers that the obligation was unpaid when it was assigned, and that the defendant had full knowledge of the assignments at the times and places they were respectively made, and then, in apt form, assigns the breach in failing to pay the last assignee, who was plaintiff. There is no necessity to aver non-payment to the assignor, when it is averred that the obligation was unpaid at the time of assignment, and that

No necessity to aver non-payment to assignor when it is averred that the obligation was unpaid at the time of assignment and that obligor

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the obligor, at that time, knew of its transfer. He could not, thereafter, make payment lawfully to the assignor.

Response.

at that time had notice of the assignment.

Appellate court will *judicially* take notice of the fact that commonwealth bank notes are not equal in value to their nominal amount; but it will not *judicially* notice the rate or degree of depreciation.

In a suit on a contract for commonwealth's bank notes a judgment rendered, in specie, for the full amount of the contract and interest thereon will be reversed: But if the judgment be, in the least degree, less than the full amount of contract and interest thereon, it will not be reversed, because the court will not *judicially* notice the degrees of depreciation.

We have said that we would take judicial notice of the fact, that Commonwealth's Bank notes were not equal in value to their nominal amount in specie, and we have intimated that we could not tell the degree of depreciation which prevailed at different times and places, and, therefore, we were disinclined to decide, especially as it has never before been necessary, that we would not, in any case, take notice of the rate of depreciation. It might seem that if we knew Commonwealth's Bank paper was not equal to silver, that we might likewise know *judicially* that a paper dollar did not approximate a silver dollar in value as near as a given point; for instance, that a paper dollar was not worth 99½ cents in silver. There would be great difficulty in establishing such a rule; for, although in the case put we might feel safe in coming to the conclusion that a paper dollar on the Bank of the Commonwealth was not worth 99½ cents in silver, yet the difficulty in applying a rule which involves the rate of depreciation is such, that it seems to us no rule can be adopted except that upon which we have heretofore acted, to wit: we will not sustain a judgment upon a contract for Commonwealth's paper rendered for specie to the full amount of the contract and interest thereon. But when the judgment, as in this case, does not come up to the full amount, we will not, without proof, undertake to say what it should be, and therefore reverse, because of the impossibility of adopting any rule of certain application. The petitioner asserts that the paper called for in the contract was worth only half its nominal amount; this may be, but we cannot know it unless he had proved it.

We know that the executions and endorsements thereon do not sustain or furnish grounds to reverse a judgment. But in this case the plaintiff in error has thought proper to present them to the court. We were not bound to shut our eyes against their contents. When they are looked into, they prove that a defaulting debtor, who could not possibly be

injured beyond the amount of the interest, has <sup>NEAL</sup>  
thought as much, if not more, about the gratifica- <sup>VS.</sup>  
tion of taxing his adversary with the costs of the DUBRETT.  
litigation in this court than he has about the specific <sup>Response.</sup>  
performance of his contract in proper time.

Upon the whole, we think the judgment must be affirmed, with costs ; and, therefore, the petition for a re-hearing is overruled.





**CASES**  
**ARGUED AND DECIDED**  
**IN THE**  
**COURT OF APPEALS**  
**AT**  
**THE SPRING TERM,**  
**1832.**

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*Present*—**GEORGE ROBERTSON, Chief Justice,**  
**JOSEPH R. UNDERWOOD, and**  
**SAMUEL S. NICHOLAS, Justices.**

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**Ellis vs. Gosney's Heirs.**

**CHANCERY.**

*Appeal from the Fayette circuit ; THOS. M. HICKY, Judge. Case 24.*

*Set off. Damages. Practice.*

*Chief Justice ROBERTSON, delivered the opinion of the Court— April 3.*  
*Judge Nicholas did not sit in this case.*

THIS case was once before in this court,  
and was remanded to the circuit court for further  
proceedings conformably to the mandate. See I J. J.  
Marshall, 346.

After the case had been remanded, the circuit  
court ascertained that estate of the value of \$688 78

**NOTE.**—Judge Bockner having, on the 21st day of December,  
1829, resigned, Samuel Smith Nicholas was appointed, on the 28d  
December, 1831, to fill the vacancy caused by his resignation.

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cents had come to the appellees as the heirs of Elizabeth Gosney; and having further ascertained that the use of the slave Tom, from the date of the judgment in detinue, (13th March, 1818,) was worth \$60 per annum, decreed that the aggregate value of such use should be set off against, and should extinguish the appellant's claim to damages for the breach of Mrs. Gosney's warranty of title, and dissolved the injunction to the judgment at law. The appellant now complains that this latter decree is erroneous, to his prejudice: and, in our opinion, it is so.

Error to decree compensation for the detention of a slave after judgment in detinue.

According to any principle of law or equity, or any precedent ever recognized by this court, the appellees are not entitled to a decree for compensation for the detention of the slave since the date of the judgment in detinue. Besides, if they elect to take the assessed value of the slave, (as there is scarcely any doubt they will, and as they are permitted by the decree to do,) surely they should not also be allowed for his hire since the judgment. The decree is, in this particular, erroneous; and was not consistent with the mandate from this court.

Liability of heirs limited by the value of estate descended, and not chargeable with interest on that value.

The liability of the appellees on their mother's warranty is limited by the value of the estate, which, as heirs, they derived from her. They are not chargeable with interest on that value.

The appellant's claim to damages, when adjusted, as against his vendor, according to right and justice, would exceed the maximum for which the appellees can be held responsible. The price actually paid by him for Tom was \$413 33 cents, compounded of £100 paid in money, and \$80 allowed as compensation for finding and restoring him.

Criterion of damages for breach of warranty of title to slave, the sum paid and legal interest from the time debt charged with damages for detention.

There was not, however, a total failure of title. His vendor owned a life estate in the slave; and that he, of course, enjoyed without disturbance or liability. But as the jury, in the action of detinue, valued Tom at \$700 in 1818, we must infer that he was worth more then, than he was when the appellant bought him. We are, therefore, inclined to think that the consideration, to wit, \$413 33 cents, with legal interest thereon from the 8th of May, 1815, (from which time Ellis was charged with damages for detention.)

would constitute the proper measure of damages against the vendor on her warranty of title. As this amount would exceed \$688 78 cents, (the value of the estate for which the appellees may be held liable,) the damages which he has a right to set off against their judgment must be \$688 78 cents.

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vs.  
GOSNEY'S  
HEIRS.

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As the appellees elected, by their *feri facias*, to take the assessed value of the slave and the damages allowed for his detention, and as there is no proof or even any intimation that the appellant ever offered or was willing to surrender him upon any terms whatever, we are of opinion that, in equity, he should be now deemed the owner, and that the judgment should be considered and treated as a simple judgment for the value and the damages; and that now, and hereafter, in consequence of the decree to be entered herein, the appellant shall not be exonerated by surrendering the slave, nor the appellees permitted to reclaim him should they wish to do so.

If plaintiff in detinue elect to take the assessed value of slave and damages for detention, defendant is to be considered owner of slave and the judgment to be treated as a judgment for money.

Wherefore, it is decreed and ordered that the decree of the circuit court be reversed, and the cause remanded, with instructions to enter a decree setting off \$688 78 cents, and the costs of this suit against the judgment, perpetuating the injunction to that extent, (granted since the case was remanded,) and dissolving it as to the residue of the judgment with damages, allowing the appellees the right to have execution for the sum which shall remain due upon their judgment for damages and costs.

Decree of set off.

Costs are decreed to the appellant here and in the circuit court.

*Wickliffe* and *Wooley* for appellant; *Payne* and *Combs* for appellees.

## COVENANT.

*Patteson et al. vs. Garret.*

## CASE 25.

Appeal from the Russel circuit; J. L. BRIDGES, Judge.

*Covenants. Construction.*

April 3.

Chief Justice ROBERTSON, delivered the opinion of the Court.—  
 Judge Nicholas did not sit.

By a writing dated Sept. 14th, 1825, Jonathan Patteson and George Wagley leased to Tho. I. Garret, for the term of two years to commence *the first of November, 1825*; "the Greasy Creek Paper Mill with all the necessary apparatus for the purpose of carrying on business of paper making for one vat," and covenanted to furnish the stock and materials necessary for "*making paper*," to furnish comfortable cabins for Garret's family and negroes, and to keep "the mill and apparatus in good repair" during the term, in consideration of a covenant by Garret, to furnish all the hands "necessary and proper in such an establishment, or any other, on the like scale" for carrying on, with proper facility, the business of "paper making," and to deliver to them "two thirds of all the articles manufactured" in the mill during the term.

By a supplemental writing dated July 15th, 1827, (the lessee having, in the mean time, been in the occupancy of the mill since the first of Nov. 1825,) the parties extended the term for five years beyond that stipulated in the original article.

On the article thus extended, this suit was brought, August 14th, 1829, by Garret for alleged breaches of their covenant by Patteson and Wagley. *Thirty two* breaches are assigned in the declaration, all of which may be embraced within the following classes:—1st. Such as allege a failure to furnish all the apparatus necessary for making paper. 2nd. Such as allege a failure to furnish comfortable cabins and all necessary stock and materials. 3rd. Such as charge a failure to make necessary repairs.

After various and elaborate pleading in matters of law and of fact, issues to the country were concluded, and a verdict and judgment were thereupon rendered in favor of Garret for \$200 in damages, to reverse which this appeal is prosecuted.

The assignment of errors complains: 1st, that the declaration is insufficient; 2nd. that the circuit court erred in sustaining demurrers to pleas 12 and 14, and 3rd, that illegal testimony was admitted on the trial.

PATTESON  
ET AL.  
VS.  
GABRET.

I. Only two specific objections to the declaration have been suggested, and it is, in our opinion, good unless these, or one of them, be fatal. They are, 1st, that, according to a proper construction of the covenant, (as the appellants insist,) they leased only such articles of necessary apparatus as were at the mill at the date of the lease, or in other words, such of the articles then there as should be necessary, and the declaration charges, as a breach of that stipulation, a failure to procure and deliver to the appellee apparatus not at the mill at the date of the demise, but alleged to be necessary for making paper.

2nd. that the declaration assigns as a breach of the covenant, a failure to furnish some apparatus alleged to be necessary for making *pasteboard* which, according to *their* interpretation, the appellants say, they never covenanted to furnish.

As is but too often the case in reducing contracts to a written form, the language used in this covenant, is not so appropriate, precise, or intelligible, as to leave no room for doubting what the parties intended.

But the covenant examined altogether, imports, we think, according to a reasonable and consistent interpretation, that the covenantors undertook to furnish, with the mill, *all apparatus which might become necessary* for manufacturing paper according to the ordinary process usually adopted by conductors of such establishments, and that all such apparatus, whether at the mill, or not, at the date of the contract, was included in the lease. Having repeated, according to its letter and legal effect, so much of the contract as can bear on the point now under consideration, we deem it superfluous to swell this opinion by an analysis of the considerations which, in our opinion, establish the construction of the stipulation to lease the mill and all "*necessary apparatus.*"

Covenant construed.  
The words "all necessary apparatus" mean all such articles as are usually employed in the business referred to.

PATTESON  
ET AL.  
VS.  
GARRET.

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This construction overrules the first objection to the declaration. The second is equally unsustainable; 1st, because the breaches to which it applies, do not charge a non-delivery of apparatus necessary for making pasteboard merely, but only a non-delivery of apparatus averred to be necessary for making paper, and 2nd. because pasteboard is paper according to the popular and true unqualified import of the latter.

Hence, though the declaration contains such an unusual number of breaches, and though there was a demurrer to each breach, and a general verdict on the whole declaration, there is no error in the opinion of the circuit court on the demurrer to the count nor in its failure to arrest the judgment on the verdict.

II. The 12th plea merely averred a delivery of such apparatus *necessary* for paper making as was at the mill at the date of the lease. The construction which we have given to the covenant, sustains the judgment of the circuit court on the demurrer to that plea. The 14th plea avers, that the appellee accepted in discharge of the covenant as to the apparatus, such articles as were at the mill at the date of the lease. As a plea of accord and satisfaction, this is not good. A delivery, at the time, and place stipulated, (as averred in this case,) of a part of a multitude of things covenanted to be delivered, cannot be well pleaded as an accord and satisfaction of the entire covenant, and the receiving of part of the stipulated articles cannot be deemed, *per se*, a waiver of a right to such as were never offered. Consequently, there is no error in the judgment on the demurrer to the 14th plea.

Plea that a portion of a multitude of articles were delivered at the time and place all were to have been delivered, not a good plea of accord and satisfaction.

III. On the trial the appellee proved, that a roller, not furnished by the appellants, was necessary for making pasteboard, and that it was not only customary to make pasteboard at paper mills, but that a great loss in the material would inevitably result from a failure to make pasteboard in a paper manufactory. The appellants objected to this testimony as incompetent, but their objection was overruled; and this presents the last objection to the judgment.

As "*paper*" includes all the various qualities of the article thus denominated, and as pasteboard is paper of a coarse and inferior quality, the covenantors were bound to furnish the apparatus necessary for making pasteboard, especially as the parol testimony proved that it had been the custom of paper makers to manufacture pasteboard at their paper mills, and that the manufacturer of paper would sustain a material loss by failing to make the one with the other. This testimony did not enlarge, or contradict the covenant, and was, therefore, admissible. Besides, it would have been admissible to aid in, or fortify the construction of the covenant, because it proved, what the custom was, and consequently tended to shew what the parties meant by the comprehensive terms, "*paper mill*" and "*paper making business*."

ARNOLD  
vs.  
TRUNDLE.  
Parol testimony admissible to aid & fortify the construction of a covenant the terms of the covenant not being contradicted.

Wherefore, the judgment of the circuit court is affirmed

*Mills and Brown* for appellant; *Owsley* for appellee.

## Arnold vs. Trundle.

Error to the Boone Circuit; BROWN, Judge.

*Pleading. Consideration. Practice.*

Judge UNDERWOOD, delivered the opinion of the Court.

PETITION &  
SUMMONS.  
Case 26.

April 3.

TRUNDLE sued Arnold by petition and summons, upon a note under seal, for \$200. On the calling of the cause for trial, the plaintiff in error filed two pleas to the consideration of the note, and likewise offered to file a plea to the following effect: "that the said Trundle his said action ought not to have against him, &c. because he says that the said Trundle, the plaintiff, obtained said note from him, said defendant, by fraud covin and misrepresentation in this, that said plaintiff before, and at the time of the execution and delivery of said note to him by the defendant, had in his possession a note for the sum of \$200, before that time executed and



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vs.  
TRUNNIE.

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delivered by said defendant to N. G. Brown, and said plaintiff, so having said note in his possession, falsely and fraudulently told said defendant that said note, last above mentioned, belonged to said plaintiff, and had been transferred to him by said Brown, and that said Brown wished said defendant to execute and deliver said defendant's own note to said plaintiff for said \$200, in lieu of said note, which he, said Brown, had transferred to said plaintiff, and said defendant believing said false and fraudulent statements of said plaintiff, and that he was the owner of said note, executed, as aforesaid, to said Brown, did then and there execute and deliver to said plaintiff said defendant's own note for said \$200, in lieu of said note, which he had before that time executed to said Brown, which was the sole consideration of said note, mentioned in said plaintiff's said petition, and said defendant, in fact, says that said note, which said defendant had executed to said Brown did not then, or at any time before or since, belong to the said plaintiff, and that said Brown did not then, or at any time before or since, wish said defendant to execute and deliver said defendant's own note to said plaintiff for said \$200, in lieu of said note before executed to said Brown, but said defendant in fact says that said last mentioned note was always the property of said Brown, and said defendant has actually paid and satisfied said Brown the amount of said last mentioned note long before the commencement of said plaintiff's said action, and said defendant is ready to verify this plea—wherefore he prays judgment," &c.

The circuit court refused to permit the foregoing plea to be filed and the defendant excepted. The defendant (now plaintiff) then made an unsuccessful motion for the continuance; after which he withdrew his two pleas filed to the consideration, and judgment was entered in favor of the plaintiff in the circuit court.

If a defendant withdraw his pleas, the refusal of the circuit court to continue the cause will not be considered by the appellate court.

Whether the court erred in refusing to permit the above mentioned plea to be filed is the only question worthy of our consideration. Whether the Circuit Court did or did not err in refusing to continue the cause cannot be enquired into; because the defendant

voluntarily withdrew his pleas; and in consequence thereof the cause comes up, with the exception of the plea above, as though no plea had been filed or defence made. A defendant has no right to a continuance where he fails to plead, or, having plead voluntarily withdraws his pleas, unless the object in moving for a continuance is to enable him to plead and to make out his defence in proper shape. The continuance was not asked for any such purpose.

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Modern practice looks to the substance of pleading rather than to its technical precision.

It is not distinctly averred in the plea aforesaid, that the note upon which suit has been instituted, is the identical note executed by the plaintiff in error in consequence of the fraudulent representations of the defendant in error, in lieu of the note previously executed and delivered to Brown. But we think, from the tenor of the whole plea, it is sufficiently apparent that the note sued on is the same which was procured by the fraudulent misrepresentations of the defendant in error. As the liberality of modern pleading looks to the substance of things more than to technical precision, we shall regard the plea as averring that the note sued on is the same which was obtained from the plaintiff in error by the fraudulent misrepresentations of the defendant in error as therein set forth. Under this view, we think the plea contains a good defence to the action.

One of the defences to actions on contracts under seal stated by Chitty, in his analytical tables, is that "the deed was obtained by fraud." 1. Chitty, 462, The facts averred in the plea show a clear case of fraud. The ground upon which the circuit court rejected the plea, we suppose, was, that it was not verified by the oath of the plaintiff in error.

A plea impeaching the consideration of a note or deed sued upon must be verified by oath; a plea admitting a valid consideration if representations of obligee had been true but alleging the note or obligation to

According to the principles of the common law, the defendant, in an action founded upon a deed, was estopped to deny that it was executed upon sufficient consideration. The deliberate solemnity of the act was conclusive evidence of a sufficient consideration. Powell on Contracts, 332—340. By an act of assembly, passed in 1801, 1 Dig. 257, defendants were authorized by special plea to go in to or impeach the consideration of sealed instruments in the same manner as if the writing had not been sealed. By an act of 1815 1 Dig. 265 special pleas, impeaching the consideration of written

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have been  
procured  
fraudulently,  
by false representations.  
needs no verification by  
oath of the  
party under  
the statutes  
of 1801 &  
1815. I. Dig.  
257; 263.

instruments according to the provisions of the act of 1801, were to be supported by affidavit of their truth. Were it conceded that the plea in question was simply a plea impeaching the consideration of the note sued on, then it would be clear that the circuit court acted correctly in rejecting it, or refusing to let the plaintiff in error file it, because it was not verified by affidavit. But we apprehend that the plea does more than go into or impeach the consideration of the note sued on, as provided for by the act of 1801. Taking its averments to be true, it admits a valid consideration, provided the representations of the defendant in error, upon the faith of which the note was executed, had not been false.

- The merit of the defence, as exhibited in the plea, turns upon the fraudulent misrepresentations of the defendant in error—and the note and cause of action are defeated by the fraud, which is the issuable matter alleged, and not by any failure of consideration, or any want of consideration, had the facts existed as represented. The plea, therefore, as it impeaches the note for fraud in its procurement, is an available defence upon the principles of the common law, as much so as if it had alledged that the note had been palmed on the plaintiff in error (he being blind and unable to read it) as a note for two dollars.

The execution of the note was not denied by the plea. On the contrary, it was admitted. The case of *Burton & Jarman vs. Emerine*, I. Litt. 409, shews that a plea averring that the note sued on was given upon a gaming consideration need not be verified by the affidavit of the defendant, notwithstanding the provisions of the aforesaid acts of 1801 and 1815. The present is a clearer case in favor of the admissibility of the plea unsupported by the oath of the party pleading it. See also the case of *Chambers vs. Simpson's Admrx.* I. Mon. 113.

The judgment of the circuit court is reversed, with costs, and the cause remanded for proceedings not inconsistent with this opinion.

*Marshall*, for plaintiff; *Denny*, for defendant.

**Lessee of Speed &c. vs. Brooks.**EJECTMNT. 7jm 119  
111 576

Error to the Bullitt Circuit; P. I. BOOKER, Judge.

Case 27.

*Evidence.*

Judge UNDERWOOD, delivered the Opinion of the Court.

April 3.

**IMPROPER** evidence was permitted to go before the jury on the trial of this cause. The defendant in error, who was defendant in the circuit court, read in evidence a grant to Benjamin Wyncoop covering the land in controversy. To connect himself with the grant, he read a deed from Joseph Wyncoop and undertook to prove that said Joseph was the heir at law to said Benjamin. The deed executed by Joseph Wyncoop purports to convey the land to J. F. Moore and Joseph Brooks. Jones was the witness introduced to prove the heirship of Joseph Wyncoop. All the information he had upon the subject was derived from Moore, J. Brooks, and J. Wyncoop, and this information did not extend so far as to enter into the pedigree of Jos. Wyncoop. He neither knew personally or by reputation the degree of relationship subsisting between Benjamin and Joseph Wyncoop. All that he detailed in evidence was, that Joseph was called the heir of Benjamin by Moore and Brooks, and they derived their knowledge from Joseph himself. This will not do—first: because it is mere hearsay, coming from interested parties, who thereby undertake to support their own title; and, secondly, it is an attempt to prove matter of law instead of fact.

Evidence of heirship obtained from those through whom title is attempted to be devised not admissible.

The defendant read as evidence a deed bearing date on the 19th Feb., 1800, executed by Geo. Slaughter, by his attorney in fact, A. Breckenridge, to Jos. Brooks. No power was shown authorizing Breckenridge to make the deed for Slaughter. But on the 28th of May, 1817, Slaughter, in proper person, acknowledged the execution and delivery of the deed before the clerk of the county of Bourbon, who certified the same, and on the 3d day of June following, it was admitted to record in the county of Bullitt, where the land lay. The plaintiff objected to reading the deed as evidence, because Breckenridge's authority was not proven and because Slaughter had not acknowledged the deed in proper per-

LESSEE OF  
SPEED  
vs.  
BROOKS.

If a deed be not enrolled within eight months from its execution it's not competent evidence unless its execution be proved. Deed executed in 1800 by agent—in 1817 the principal acknowledges the deed as his act and deed before the clerk. This acknowledgment must have relation to the original execution of the deed and cannot operate as a new delivery or second execution of the deed.

son within eight months from its date. The court overruled the objections, and permitted the deed to be read as the deed of Slaughter from the date of his acknowledgment before the clerk of Bourbon. To this opinion of the circuit court, an exception was filed, and its correctness is questioned here.

The opinion of the circuit court on this point cannot be sustained, unless the deed can be regarded as having been legally enrolled by the clerk of Bullitt, for there was no proof of the execution of the deed by Slaughter, other than the certificate of the clerk of Bourbon. The acknowledgment before the clerk of Bourbon shows an attempt to give validity to the deed as executed by Breckenridge the attorney in fact. The certificate states that Slaughter "acknowledged and delivered the deed from him by A. Breckenridge, his attorney in fact, for that purpose to Joseph Brooks as and for the act and deed of him the said Slaughter." Now whether this be regarded as an attempt to confirm what Breckenridge had done (in which light we view it) or as an acknowledgment of the hand and seal subscribed to the deed as the act of Slaughter, it equally follows that the acknowledgment is evidence of the delivery of the deed, which is always presumed to have been made on the day of its date, unless the contrary be proven. See *McConnell vs. Brown &c.* Select Cases 465 & 466. It must, therefore, be taken, that the deed in this case was delivered in 1800, as there is no proof to the contrary. The case cited is a clear authority shewing that the idea of a new or second delivery of the deed by the acknowledgment in 1817 cannot be tolerated. If the acknowledgment in 1817 had any effect, it was to make the deed then acknowledged good and operative from its date. This being the case, as it was not enrolled within eight months from its delivery it could not be read without proof of its execution. The certificates of clerks under such circumstances prove nothing, as is clear from many adjudged cases. See *Morgan vs. Bealle*, I. Marshall, 310; *Anderson vs. Turner*, II Litt. 237; *Winlock vs. Hardy*, IV. Litt. 292. The result is, that the court erred in admitting the deed from Slaughter to be read as evidence as an enrolled deed.

We perceive no errors in the opinions expressed **BRADLEY**  
 by the circuit court in the instructions, unless it be **VS**  
 a failure to define, with sufficient clearness, what **CATLET'S**  
 amounted to a vacation, or abandonment of pos- **HEIRS.**  
 session.

But for the errors pointed out, the judgment must be reversed with costs, and the cause remanded for a new trial, not inconsistent with this opinion.

### **Bradley vs. Catlet's Heirs.**

**CHANCERY.**

Error to the Caldwell Circuit ; SHACKLEFORD, Judge.

**Case 28.**

*Decree, opening of. Absent defendants. Answer.*

**April 4.**

Chief Justice ROBERTSON, delivered the Opinion of the Court.

JOHN BRADLEY filed a bill in chancery against the widow and unknown heirs of Hanson Catlet, deceased, and against John Spinks, executor of James Spinks, dec'd. for a specific execution of a covenant for the conveyance of some town lots, executed by Catlet to James Spinks, and assigned to the complainant by John Spinks in pursuance to an authority in the will of James Spinks.

Upon a certificate of publication, (by an editor,) against all the persons prayed to be made defendants, the circuit court decreed that all of them should convey to Bradley with general warranty of title by Spinks and Catlet's heirs.

At the term next succeeding that at which the decree had been rendered the circuit court, on the motion of counsel for Catlet's heirs and on the affidavit of Chittenden Lyon, stating their several names and alleging that they were all nonresidents and that all of them, except a female married to one Hepburn, were infants, the decree was opened, and the answer of the infant heirs of Catlet was filed by C. Lyon, their guardian *ad litem*:—to all which Bradley excepted.

The answer required proof of the payment of the consideration, and none having been furnished,

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CATLET'S  
HEIRS.

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the bill was dismissed absolutely on hearing at the term succeeding that at which the answer had been filed.

To reverse this last decree this writ of error is prosecuted.

When joint  
decree has  
been rendered  
against ab-  
sont defend-  
ants, to open  
the decree on  
the answers of  
part of the  
defendants  
being filed, is  
error.

However unjust or erroneous the first decree may have been it was irregularly opened. As the interest of the widow and heirs of Catlet was derived at the same time and from the same source the decree against them is joint, and should not be reversed or enquired into by any direct proceeding, unless all who are thus jointly concerned and were nonresidents be made parties to the new proceeding. [See *Dunlop's heirs vs. McIlvey, et al*, 3d Lit. Reports, 272.] Wherefore, as neither Mrs. Catlet nor Mrs. Hepburn nor her husband answered the bill, the first decree was improvidently opened. If each individual who may be affected by a joint decree should be permitted, for himself alone, by a separate proceeding, to open the decree, or if any one should be allowed to open it as to all, confusion and injustice could not be avoided. The decree should not have been set aside in this case without the answers of Mrs. Catlet and Hepburn and wife. Bradley had a right to the benefit of their answers.

Spinks was improperly made a party in the first instance—and as he held no interest whatever in the lots, and is not therefore affected by the decree against the other parties to it, we suppose he was not an indispensable party to the proceeding for opening it so far as they are concerned. He might refuse to unite with them, and, as he and they are not associated in interest or in any other way, by their own act or by the operation of law, neither should be made to suffer loss or inconvenience in consequence of the act or omission of the other—for opening the decree he may be considered one party, and they may be deemed a distinct party.

But the counsel for the defendants has argued that the first decree is erroneous; and that, therefore, the plaintiff has not been injured by the opening of it, and should not now be suffered to take advantage of any irregularity in opening it. We think differently. Were it conceded that the ori-

ginal decree was even void the plaintiff may complain that the circuit court *erroneously set it aside*. The last decree bars his asserted equity. The first, if it had been void, or had been merely avoided, would have left him free to prosecute his claim in a new suit and proper manner. Perhaps he may have a perfect equity—perhaps he may be able to establish it—and perhaps he failed to do so in this case only because he deemed the proceeding (as it was) irregular and therefore resolved to be passive.

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HEIRS.  
vs.  
BROWN.

Wherefore the last decree is reversed, and all orders made since the date of the original decree are set aside.

*Crittenden*, for plaintiff; *Monroe*, for defendants.

## Waters' heirs vs. Brown.

Appeal from the Washington Circuit; P. J. BOOKER, Judge.

CHANCERY  
Case 29

### *Specific execution.*

Chief Justice ROBERTSON delivered the opinion of the court.—  
Judge Nicholas did not sit in this case.

April 5.

THIS writ of error is prosecuted to reverse a decree dismissing a bill in chancery, filed by Philemon Waters against William Brown for a specific execution of the following agreements in writing, "First, a contract, dated January 26th, 1822, stipulating that three actions of ejectment then pending, for the benefit of Brown against persons who held under Waters as purchasers, should be dismissed at the costs of Waters, excepting the cost of the last continuance—that Brown should hold all the land covered by his patent, courses and distances, except so much thereof as two of the defendants in the ejectments had purchased from Waters, and that the land so purchased, and also so much as should be included between lines run according to marked corners claimed by Brown, and lines run according to the courses and distances of his patent should be equally divided between the contracting



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parties. Second, a contract dated the same day—so awkward, loose and ambiguous in its phraseology as to be scarcely intelligible, and, at best, of very doubtful import and effect, but which, after careful examination, we are inclined to construe, as the parties themselves seemed to have interpreted it, to be, not a substitute, but merely a supplement to the first agreement—and meaning, that Brown agreed to exchange his interest, according to the first agreement, in the land held by the vendees of Waters for a designated tract, “to the East,” claimed by Waters—that the parties should convey to each other, by deeds with warranty and personal security, and that he whose tract should be estimated as the more valuable, by persons to be selected as valuers, should pay to the other the difference in money.

The bill alleges that the two last mentioned tracts had been valued by persons selected by the parties—that the tract to be conveyed by Waters had been valued at \$2 50 cts. an acre more than that which Brown was to convey—that Waters had offered to execute the agreements on his part—but that Brown had refused.

Brown in his answer, admits the material allegations of the bill, and consents to a specific execution *so far as may be consistent with equity*, but denies that Waters has any title to the land which he agreed to convey in exchange and requires an exhibition of his title. Waters having died the suit was revived by his heirs.

Specific execution of an agreement denied, the agreement and proofs not rendering the rights of the parties clear and definite.

We are inclined to think that the last agreement cannot be specifically enforced consistently with the established rules of equity nor without great danger of injustice—1st. Because the bills and answers, exhibits and proofs leave this branch of the case in confusion and doubt respecting the precise understanding and rights of the parties.

If complainant praying specific execution of an agreement to exchange land, fail to shew title to the land he contracted to

2nd. Because, though called on to shew title, the plaintiffs failed to exhibit any document or proof whatever of title to the land which their ancestor covenanted to convey, and there is not even any allegation that he had any title. The nature of his claim, or whether or not he had any title, cannot be presumed to be within the knowledge of Brown.

But we can perceive no reason for withholding a specific execution of the first agreement. To that, Brown has not objected and seems to have no sufficient excuse for resisting such a decree. The suits had been dismissed, and Waters had paid the costs which he had covenanted to pay.

We are of opinion that so much of the bill as sought a specific execution of the last agreement should be dismissed without prejudice to any legal right; but that a decree should be rendered for enforcing the first contract and quieting the conflicting claims thereby compromised:—Consequently the circuit court erred in dismissing the bill and refusing relief to any extent.

By rendering such a decree as we have suggested the parties would be left, as they should be, to their legal rights and remedies concerning the last agreement—which would not be, in any manner, affected by a specific enforcement of the first contract.

Whether Brown's occupancy of the land which Waters covenanted to convey to him, should be deemed the possession of Waters since the date of the last agreement or of the valuation, or whether it should be considered since, as it was before that time, adverse to Waters, we are not permitted now to decide, and shall not therefore intimate.

Decree reversed and cause remanded with instructions to decree a specific execution of the first agreement of compromise—and to dismiss the bill without prejudice so far as it sought a specific execution of the last contract.

Cunningham and *Me Henry*, for appellants; *Chapeze*, for appellee.

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**HEIRS**  
**vs.**  
**BROWN.**

convey, the court will not compel defendant to perform.

Complainant having performed his stipulations, specific execution enforced against defendant.

Decree. Specific execution in part, bill dismissed without prejudice to legal rights of the parties as to residue.

*Arbitration.***Frost &c. vs. Smith's Heirs.****Case 29.**

Appeal from the Jessamine circuit; W. L. KELLY, Judge.

*Arbitration. Award. Common law. Statute.***April 3.**

Judge UNDERWOOD delivered the opinion of the court.

GEORGE S. SMITH, in his life time, instituted a suit in chancery against Simeon Frost and others, to settle a controversy growing out of an interference between John Moseley's entry for 20,000 acres, and Blackford's preemption claim of 1,000 acres.

This suit was finally disposed of by this court. See the decision in 1 Bibb, 375, where the nature of the claims of the several parties are fully set forth.

Thereafter, the heirs of Smith, recognising the right of Frost, &c. to 500 acres of Blackford's preemption under the decision of this court, filed their bill for the purpose of having a partition of the preemption between them and Frost and those claiming under him.

In 1829, Mason Singleton instituted an action of ejectment against Thomas S. Smith. The declaration contains two counts, the demise in one of which is laid in the names of John Craig, son of Toliver, John H. Craig, and Lewis Craig, J. S.; the other being in the name of Mason Singleton.

Pending these suits, on the 16th of March, 1830, the heirs of George S. Smith, of the one part, and Martha Frost, heir of Simeon Frost, John Frost, Stephen Frost, Richard Wood, Mason Singleton, John Lancaster, Robison Wells, and Susannah Hughes, for herself and the heirs of Joseph Hughes, deceased, of the other part, entered into articles of agreement, in which it is stipulated that the undersigned parties, who are interested in the result of said suits, being desirous of finally and speedily settling all matters of difference arising in said suits, and all other controversies relative to said land, have agreed and do hereby agree, that all disputes between them arising out of said suits, or that now exist between them relative to the land which they respectively claim under the titles of Joseph Blackford's preemp-

tion and John Moseley's 20,000 acres aforesaid (all the parties claiming under both and each of said claims,) and all questions relative to improvements or rents on the land in controversy, shall be referred and submitted to the award and final decision of John Parker, &c. or a majority of them, as arbitrators; and the parties do agree, and hereby oblige themselves, their heirs, &c. to have an order of reference made at the next term of the Jessamine circuit court, pursuant to this agreement." The articles contain the following provisions :

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HEIRS.

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"The parties finally agree, that the award and decision of the arbitrators aforesaid, when made out and returned to the Jessamine circuit court, shall be entered as the final decree and judgment thereof in the several suits before named, and shall settle forever all disputes between the parties relative to said land. And it is positively agreed, that neither party, or any one of the undersigned who is interested therein, shall be at liberty to appeal or to prosecute any other suit for any matter that may be settled by said arbitrators, as it is clearly understood, that this arbitration is to settle finally and forever all controversies between the parties about said land. And, in order to make the same final and binding, each and every party and person interested who signs this agreement, hereby releases, relinquishes, and conveys to the party or person who may be entitled thereto under and by virtue of the award of said arbitrators, all and whatsoever land may be decreed to be conveyed by them respectively to any other of the parties."

The Jessamine circuit court made an order to the following effect :

"It is ordered, that all the matters of difference between the parties be referred to John Parker, &c. or a majority of them, who, in settling the controversies between the parties, are to take into consideration all matters of controversy, either in law or equity, that either party may think he has a right to urge, without regard to any form, and whose award, when returned, shall be made the judgment of the court."

At the July term, 1830, the arbitrators returned

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their award, which, notwithstanding the objections of the present appellants, was made the judgment of the court at the next ensuing October term.

However desirous we may be to enforce the decisions of arbitrators, because they are the judges selected by the parties, yet, in this case, we cannot sustain the judgment of the court rendered on the award.

There are two modes of settling controversies by arbitration; the one is according to the rules of the common law, and the other according to the provisions of our statutes. This arbitration commenced in articles of agreement, which present the features of a common law submission. But in the articles there is a stipulation binding the parties to make their submission a rule of court—thus demonstrating an intention to make the arbitration *statutory*.

Though the words employed in submission to statutory arbitration be "all matters of difference," yet the court will confine the arbitrators to the matters of difference involved in the preceding suits as exhibited by the record and pleading prior to the submission. If more is intended to be embraced, parties should make a statement in writing setting forth the matters of difference not in suit.

The order of court is sufficiently broad to embrace every description of controversy existing between the parties, whether in suit or not. The language used, "all matters of difference," embraces every thing. Still, we apprehend, it must be confined to the *matters of difference* exhibited in the suit in chancery and the action of ejectment then pending, and that the arbitrators could not, under such a general submission in a statutory arbitration, undertake to settle all the disputes, of whatever nature, existing between the parties relying upon the power of the court to enforce the award by its judgment. Such a course would be directly against the authority of the cases of *Fitzgerald, &c. vs. Fitzgerald, &c. Hardin, 288*, and *Emerson vs. Hutcheson, 11 Bibb, 455*. The doctrine of these cases is, that the record or pleadings of the parties, previous to the submission, must shew the matters to be determined by the arbitrators. This conforms to our views of the requirements of our statute, 1 Dig. 90. It is our opinion, therefore, that the submission did not embrace any thing more than the suit in chancery instituted by Smith's heirs vs. Frost, &c. and the ejectment instituted by Singleton. If the parties, by their articles, designed to embrace other matters, it was their duty, in making the submission a rule of court, to file a statement in

writing, shewing the nature of any controversy not in suit, and then, by the terms of submission, embrace it. As this was not done, no judgment of the court could legally be rendered upon any award touching such matter. And so far as the award of the arbitrators operates upon matters not embraced by the suits aforesaid, the parties must be left to their common law remedies, if any they have, viewing the proceeding as a common law arbitration.

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SMITH'S  
HEIRS.

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It was altogether improper in the court to render judgment upon so much of the award as directed Martha Frost to restore the possession of land which she had recovered in an action of ejectment against Smith's heirs. This matter was not embraced by the submission viewing it as a statutory arbitration; and whether the award on this subject is worth any thing upon common law principles, taking the articles as evidence of the extent of the submission, we shall not now decide. This suit is, however, not expressly named in the articles.

Error to render judgment upon an award touching matters not within the submission.

The award and judgment of the court operate upon the rights of the heirs of Joseph Hughes, deceased, requiring them to release lands which had been conveyed to their ancestor. This is clearly erroneous. It does not appear whether the heirs of Joseph Hughes were under age or that they were represented in the submission by their guardian. It may be inferred that they were infants, from the circumstance that Susannah Hughes undertakes, in the article of agreement, to act for them; but were that the case, there is no evidence that she had authority as guardian to submit their claims to arbitration according to the statute of 1797, 1 Dig. 89. We think the record should furnish some evidence of the authority to submit the controversy to arbitration, before the rights of infants are affected by the award. We look upon the judgment against the heirs of Hughes, therefore, as altogether unwarranted.

Erroneous to render judgment on an award affecting the rights of infants, unless they were properly represented in court by guardian according to statute 1797, 1 Dig. 89.

The arbitrators refused to decide upon the count in the ejectment case instituted by Singleton, in which the demise was laid in the names of the Craigs, because, as they say, the Craigs were no parties to the written agreement authorizing the ar-

When articles binding parties to submit their controversy to arbitration, by rule of court,

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SMITH'S  
HEIRS.

and rule made, arbitrators receive their authority from the rule, not from the articles; and should decide in ejectment upon the whole case, though the demise in one count be in the name of lessors who did not sign the agreement.

bitration. Upon the count on Singleton's demise they found that he had no title, and therefore came to the conclusion that there could be no recovery by the plaintiff in this suit. Here we think the arbitrators ran into another error by regarding the articles of agreement as governing and controlling their proceedings. Regarding the submission as totally within the rules applicable to arbitrations at common law, and looking to the articles of agreement as conferring their authority, the opinion expressed by the arbitrators as to a want of power to make an award which would bind the Craigs, was correct. But we regard the authority of the arbitrators as derived from the rule of court, making it a statutory submission, so far as the suit in chancery and the action of ejectment, instituted by Singleton, were concerned. Power was, therefore, conferred to decide the controversy upon both counts of the declaration, and the arbitrators should have done so. It does frequently happen that an individual who uses the names of others in prosecuting suits, should be protected in such use of other's names. Whether Singleton had such a right to use the names of the Craigs, the arbitrators seem not to have enquired, but dismissed the subject upon the ground that the Craigs had not signed the arbitration articles. We think the arbitrators should have investigated the whole merits of the action of ejectment upon the same points and to the full extent that the circuit court would have done it, had the cause been conducted to a trial without a submission. It is very clear that the nominal plaintiff might have succeeded upon the demise in the name of the Craigs by proving title in them, had the trial taken place in the circuit court. By the submission, under the order of court, the whole case, as depending upon both demises in the declaration, was properly placed before the arbitrators for adjudication, and their failure to dispose of the case upon each demise was a failure to decide the entire controversy submitted as embraced by the action of ejectment, which is indivisible, and, therefore, the court should have refused to give a judgment upon the award. The judgment, as rendered by the court, manifests the impropriety of the failure, on the part of the arbitra-

tors, to dispose of the demise in the names of the Craigs. The defendant is to go hence without day. He had no right to escape the action of John Doe upon the demise of the Craigs, both in the circuit court and before the arbitrators, as he has done.

ROUTT  
vs.  
FEEMSTER.

We are of opinion, upon the whole case, that the arbitrators and the court have erroneously undertaken to bind the heirs of Hughes; that they have erroneously omitted to dispose of the demise in the names of the Craigs, and that they have also erred in adjudicating upon matters not embraced by the submission.

Wherefore, the judgment of the circuit court is reversed, and the cause remanded, with directions to enter no judgment upon the award. The appellants must recover their costs.

*Crittenden and Owsley* for appellants; *Denny and Haggin* for appellees.

## Routt vs. Feemster.

COVENANT.

Error to the Bourbon Circuit; FRENCH, Judge.

CASE 30

*Statute. Unlawful gaming. Prosecuting attorney. Governor. Prerogative. Remission of fine and forfeitures.*

Judge NICHOLAS delivered the opinion of the Court.

April 4.

ROUTT was convicted under an indictment for permitting unlawful gaming in his house, and sentenced to pay a fine of \$250. Afterwards, on the day of his conviction, Feemster, as commonwealth's attorney, gave him a receipt for the amount of the fine, but without, in fact, receiving any part of the money, and took from Routt a covenant, with surety, to pay him \$250, for the use of the commonwealth, provided the governor did not, by a named day, remit the fine. The governor afterwards remitted the whole of it except \$20. Feemster then brought this suit upon the covenant against Routt. The case was submitted to the de-



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vs.  
FEEMSTER.

The act of 1823 to suppress unlawful gaming allows the attorney prosecuting any one to conviction, 25 per cent. on the sum collected, not on the sum recovered. It vests in the attorney, no interest in the fine separate from that of the commonwealth, nor abrogates her constitutional power to remit.

Treason excepted, the power of the governor "to remit fines and forfeitures, grant reprieves and pardons, is unlimited, illimitable and uncontrollable."

termination of the circuit court without the intervention of a jury, and the sum of \$62 50 cents adjudged to Feemster.

The act of 1823 under which Routt was prosecuted, says, that any prosecuting attorney who shall prosecute any person to conviction under it, shall be entitled to twenty five per cent of the amount of such fine as shall be collected. In rendering judgment in favor of Feemster, for one fourth of the fine, we presume the circuit court construed this act to vest the prosecuting attorney with the absolute right to that portion of it and for that much of it, as curtailing the gubernatorial power of remission.

We can see no room for any such construction. The act gives the prosecuting attorney one fourth of the money when collected, but vests him with no interest in the fine, or sentence, separate and distinct from that of the commonwealth, that would screen his share from the effect of any legal operation which should, before collection, abrogate the whole, or a part of it. It would require language of the strongest and most explicit character to authorize a presumption, that the legislature intended to confer any such right. We could never presume an intention to control the governor's constitutional power to remit fines and forfeitures. If he can, in this way, be restrained in the exercise of his power to remit, for the fourth of a fine, so can he be for the half, or the whole. This part of his prerogative cannot be curtailed. With the exception of the case of treason, his power to remit fines and forfeitures, grant reprieves and pardons, is unlimited, illimitable and uncontrollable. It has no bounds, but his own discretion. It is no doubt politic and proper for the legislature to incite prosecuting attorneys and informers by giving them a portion of fines when collected; but in so doing, the citizen cannot be debarred of his right of appeal to executive clemency. If, therefore, Feemster's recovery is to be graduated by the amount of the fine not remitted, it should have been for the fourth of \$20, instead of the fourth of the whole \$250.

He was entitled to recover nothing. The covenant on which he sues is illegal and void.

We are not called on in this case to decide, whether a commonwealth's attorney has a right to collect and receive the fines due the state in money; so, conceding that power, no just inference is thence deducible, that he can commute them for any thing else, but money. The act, before referred to, directs that any person convicted under it, shall be imprisoned in jail until the fine is paid. Can it be permitted that the prosecuting attorney shall thus intervene a substitution of his own liability to the state in lieu of that of the person convicted? Or, that he can thus interpose and frustrate the execution of the sentence of the law? Instant payment of the fine, or immediate imprisonment in jail, as a part of the penalty held forth by the law in terrorem against those who violate it. It was a manifest breach of official duty on the part of Freemanster to undertake to give ease and favor to Routt after his conviction, by indulgence as to time of payment, either with, or without security. The law gives no day, allows no respite, but requires immediate payment, or imprisonment. The covenant sued on having been given for ease and favor, obtained in breach of official duty on the part of the covenantee, the law condemns it as null and void.

The judgment is reversed, and cause remanded to circuit court for judgment to be there entered in favor of Routt, the plaintiff in error, who must recover costs in both courts.

*Brown* for plaintiff.

MARSHALL'S  
ADM.  
vs.  
Cox.

The act of 1821 directs that any person convicted under it, shall be imprisoned in jail until the fine is paid.

Prosecuting attorney has no right to give day substituting his responsibility for the consummation of the law, any covenant taken by him from the person convicted, is void, a breach of his official duty, and recovery cannot be had on it.

## Marshall's Administrator vs. Cox.

Error to the Montgomery Circuit; S. W. ROBBINS, Judge.

*Absolute bill of sale. Mortgage.*

Judge NICHOLAS, delivered the opinion of the court.

Cox conveyed to Marshall two slaves by absolute bill of sale, and after the death of the latter, filed this bill against the administrator of Marshall, alleging that the bill of sale was intended to operate only as a mortgage to secure certain debts and liabilities from Cox to Marshall.

COVENANT

Case 31.

April 4.

If a bill of sale absolute on its face, parol proof of an agreement of the parties,

HYKES  
& WIFE  
vs.  
WHITE'S  
ADM'R.

not admitted  
to prove it  
conditional;  
unless it have  
been pro-  
cured to be  
executed tho'  
fraud, or mis-  
take.

The administrator denies the allegations of the bill. It is not alleged or proved that the bill of sale was made absolute on its face through fraud or mistake.

The circuit court, on parol proof of the understanding and agreement of the parties, treated the bill of sale as a mortgage, and decreed a surrender of the slaves to Cox.

The case comes completely within the principle settled in *Thompson vs. Patton*, V Litt. 74.

The decree is, therefore, reversed, the cause remanded to the circuit court, the bill to be there dismissed at the complainant's costs. The plaintiff in error to recover his costs in this court.

*A. Davis* for plaintiff.

## Hykes and Wife vs. White's Adm'r.

CHANCERY.

Error to the Jefferson Circuit; PIRTLE, Judge.

Case 32.

*Dower. Slaves.*

Chief Justice ROBERTSON, delivered the opinion of the Court.

April 5.

THE only question presented in this case is, whether slaves possessed in right of dower by a *feme*, at the time of her marriage, survive to her or constitute (during her life, and after the death of the husband, whom she married whilst she held them as dower in a former husband's estate,) a fund for payment of his debts, and for distribution among his heirs.

Slaves held in dower, vest absolutely in the husband by second marriage during coverture, and if he die, wife living, they are assets in the hands of his executor or administrator.

The question has been expressly decided by this court in the case of *Hawkins vs. Craig and wife*, VI Mon. 256. In that case the court decided that the wife's estate in slaves, held as dower from a former husband, at the time of her marriage with a succeeding husband, vests absolutely in the latter during their joint lives, and, in the event of her surviving him, goes, during her life, to his personal representative.

But in this case the circuit court disregarded the authority of that decision, and decided that the dower which the wife held in slaves of her first hus-

band survived to her after her second husband's death ; and the counsel for the defendant in error insists that the opinion in "*Hawkins vs. Craig et ux.*" is obviously erroneous ; the imputed error resulting chiefly, as he argues, from a misquotation and misconception, by the court, of the 34th section of an act of 1798, II Digest, 1156.

HYKES  
& WIFE  
vs.  
WHITE'S  
ADM'R.

---

So much of that section as can apply to this case, is in the following words—"And where any *feme sole* is or shall be possessed of any slave or slaves, *as of her own proper slave or slaves*, the same shall accrue to and be absolutely vested in the husband of such *feme* when she shall marry."

Statute 1798,  
34 sec D.g. 2,  
p. 1156, con-  
strued. The  
words "as of  
his own proper  
slave, or  
slaves" mean  
a possession,  
*sua jure*, in  
co. tradistin-  
ction to a  
fiduciary pos-  
session.

The quotation of that section by this court, in *Hawkins vs. Craig*, omitted the words, "*as of her own proper slave or slaves*," and we admit that these words are important. But though they do not appear in the quotation made in VI Mon. their pretermission was, doubtless, the result of inadvertence in the transcription or printing, and not of ignorance of their existence. We will not presume that they were not seen and duly considered by the court in its deliberation in the case of *Hawkins vs. Craig*. And if the question now raised had never been settled, we should be inclined to decide it as our predecessors did, "*as of her own proper slave or slaves*" imports, when rightly understood, a possession *sua jure* as contradistinguished from a trust or possession *en autre droit*.

The absolute right of the wife to slaves in possession for a term of years (five, ten or twenty, for instance,) would, on her marriage, vest absolutely in her husband, and would not survive to her, because her right, though limited in duration, was perfect and absolute in its nature and quality. So is a dower right in slaves : it is legal, perfect, and absolute during its continuance ; and a widow in possession of slaves in consequence of her title to dower, is possessed of them "*as of her own proper slaves*," as long as her right exists. She has a life estate in them, and does not hold them as bailee or to the use of another, but for her own exclusive use, and in her own legal right, as widow. Her husband's representatives are entitled only to the reversion, and her particular estate is vested as absolutely in her as

The absolute right of a wife to slaves for a term of years vests in the husband, and they are assets in the hands of his personal representative, should he die before the wife.

HYKES  
& WIFE  
vs.  
WHITE'S  
ADM'R.

Statute of  
1797 imposing  
forfeiture of  
slaves held in  
dower, if re-  
moved with-  
out consent of  
reversioner  
construed.

their reversion can be in them—with the exception only of her liability to forfeiture for a removal of the slaves from the state.

The 26th section of an act of 1797, II Dig. 1247, declares, in substance, that if a husband shall remove, or permit to be removed, out of this commonwealth any slave or slaves held by his wife at her marriage with him, in right of dower, he shall forfeit *to those in reversion* his right, *during his life*, unless they consented to the removal. And hence, the counsel for the defendants argues that the legislature intended that the right to the slaves should survive to the wife; and that, consequently, as it would be unjust to affect her, or permit her to be affected, by the improper act of her husband, the forfeiture was limited *to his life*. This seems to us to be a *non sequiter*. 1st. The act of 1798 should not be materially affected by such a provision as that of the 26th section of a *prior* statute. 2nd. It is more reasonable to infer that it was the intention of the legislature to save from forfeiture the rights of the legal representatives of the transgressor, after his death, and during the continuance of the estate, for the life of his surviving wife, than to suppose that the intention was to recognise in the wife a legal title to the slaves, during her life, by relapse to her in consequence of the death of her last husband, in whom, in virtue of his marriage, all her right had been vested.

Slaves held in  
right of dower  
or vest in 2nd  
husband, and  
do not survive  
to surviving  
wife, but vest in  
the representatives  
of the 2nd husband  
during the life  
of the widow,  
subject only  
to her right of  
dower as part  
of husband's  
estate.

3d. Why were those in reversion permitted, by the 26th section, to enjoy the husband's right during *his life* unless *his* title was absolute and exclusive? And if it had once become absolutely and exclusively vested in him, how could it survive to her?

It seems to us that the 26th section of the act of 1797, does not, in any manner, tend to shew that the right survived to the wife, and that all her right, existing at the time of her marriage, vested absolutely in her husband; and, consequently, after his death, and during her life, the whole estate in the slaves for her life vested in his representatives, subject to her right to dower in them, as his wife. But, on this point, the case in VI Mon. is decisive, and needs no extraneous support.

Wherefore, the decree of the circuit court is reversed, and the cause remanded, with instructions to render a decree consistent with the principle herein recognised and established.

NOLAND  
vs.  
POPE  
ET AL.

*Crittenfden* for plaintiffs; *Denny* and *Duncan* defendants.

## Noland vs. Pope et al.

CHANCERY.

Error to the Estill Circuit; FRENCH, Judge.

CASE 33.

*Rescission. Fraud. Injunction. Damages. Costs.*

Chief Justice ROBERTSON, delivered the opinion of the Court— April 5.  
Judge Nicholas did not sit.

JOHN POPE sold to Jesse Noland, by an executory agreement in writing a tract of land, which had been devised to Mrs. Pope by her first husband Matthew Walton, and covenanted to convey the title of himself and wife; Noland paid a part of the consideration, and Bently, as assignee of Pope, having obtained a judgment for the residue, this bill in chancery was filed by Noland for an injunction, and for a rescission of the contract, and for general relief. The bill charges fraud—inability to convey the legal title, and a defect in the stipulated quantity of land, and requires an exhibition of title. The answers denied all the material allegations of the bill, and tendered a conveyance by Pope and wife, which Noland eventually accepted. But after the acceptance he insisted on a rescission of the contract, or, for a relief for an alleged deficit in the quantity.

The circuit court dismissed the bill at Noland's cost, and dissolved the injunction with ten pr. cent. damages.

The decree dismissing the bill, was proper. There is no pretext for a rescission of the contract. There is no proof of any deficit, nor of fraud, nor of any deficit in the title, which appears to be regular and complete; and therefore, Noland had no right to any relief on the final hearing, even if he had not accepted a deed.

Injunction proper when bill filed, upon dissolution of contract to decree ten pr. cent. damages.

NELSON'S  
HEIRS.  
vs.  
CLAY'S  
HEIRS.

Bill for ex-  
hibition of ti-  
tle, title  
shown not in  
the party to  
sue, but his  
wife, title a-  
cepte, com-  
plainant only  
liable to costs  
accruing af-  
ter the accep-  
tance of the  
title.

But we are of opinion, that, as the title was in Pope's wife who was no party to the contract, Noland had a right to an injunction, when he filed his bill for otherwise, if he had paid the amount of the judgment, he may, possibly, have been unable to enforce a specific execution of the contract. And consequently, the circuit court erred in awarding damages on the dissolution; and we are also of opinion, that Noland ought not to pay all the costs which had accrued prior to the acceptance of the deed. But should only pay to the defendants costs which accrued since that time.

Wherefore, the decree dismissing the bill and dissolving the injunction, is affirmed; but the decree for damages and costs, is reversed, and the cause remanded, that a decree may be entered for costs agreeably to this opinion.

Noland must have a judgment for his costs in this court.

*Ousley* for plaintiff; *Turner* for defendants.

CHANCERY:

## Nelson's Heirs vs. Clay's Heirs.

Case 34.

Appeal from the Bourbon Circuit; JESSE B. EDSON Judge.

7jj 138  
89 338

*Practice. Effect of prior decision. Rents and Profits. Improvements. Tenants in common and joint tenants. Costs.*

April 5.

Judge UNDERWOOD, delivered the Opinion of the Court.  
Judge Nicholas did not sit.

Principles  
settled when  
cause is re-  
manded to in-  
ferior court to  
effectuate the  
opinions of  
the court of  
appeals con-  
clude the par-  
ties.

We approve of the principles upon which the lands incontest have been equally divided between the parties litigant. The controversy has assumed no new aspect, since it was decided by this Court, which can authorize the assignment of more than half the lands to the appellants. But on this point, we regard the opinion of this court, heretofore delivered, as concluding the rights of the parties; and that in remanding the cause it was intended that nothing more should be done than carry into effect

the principles settled as applicable to their rights. See the case in 5 Litt. 250, where the points are sufficiently stated.

NELSON'S  
HEIRS  
VS.  
CLAY'S HEIRS

Upon the return of the case the appellants, by a second amendment of the original bill, offered to bring into partition the settlement of 400 acres and to submit to a division according to the decision of this court. This fact constitutes a sufficient reason for disregarding those assignments of error which impeach the decree, because 600 acres of land were not allotted to the appellants.

The circuit court, by an interlocutory decree, directed an account to be taken of rents and profits and improvements. From the report of the commissioners it appears that the total value of the improvements made by the appellants, and those holding under them upon the lands allotted to the defendants, now appellees, which was regarded as safe, not being covered by any interfering adverse claim, amounted to \$1,540; and that the rents, for the use of the improvements so made, amounted to \$2,450 69 in value: thus shewing an excess of rents of \$910 69. The circuit court reduced this balance to \$838 67, upon the ground that the commissioners had allowed rent upon a part of the lands improperly, by computing the rent on some of the improvements, for time running before the appellants had notice of the claim of the ancestor of the appellees. The circuit court decreed that the appellants should pay the appellees the afore-said sum of \$838 67 on or before a given day in the ensuing term, and upon the payment being made that the appellees should convey the lands allotted to the appellants.

The appellants did not pay the money as required by the decree of the court. Thereupon the court dissolved the injunction and gave the heirs of Clay the benefit of the judgment in ejectment obtained against the appellants, and dismissed their bill without prejudice, decreeing costs against them. To reverse this decree the appellants prosecute an appeal.

We think that the chancellor should have regarded the appellants and appellees as tenants in common



NELSON'S  
HEIRS

vs.

CLAY'S HEIRS

One joint tenant, or tenant in common, is responsible to his co-tenant, for waste or for receiving more than his proportion of the rents and profits of the estate so held.

It is true that the appellants had not the legal title, but then their right to it was established; and equity upon the establishment of a right, will regard the consequences resulting from it, and dispose of incidental matters, in the same manner as though the right to it was purely legal from the beginning. According to the doctrines of the common law, one tenant in common was not liable to his companion for waste or the profits of the estate; although he may have embezzled the profits or appropriated to himself the whole. The injustice of this doctrine was obviated in England by the statutes of Westminster, 2, 6, 22, and IV. Ann. c. 16; the first giving an action for waste, and the second an account for the profits. II. Com. 194. Bacon's Abr. title joint tenants and tenants in common letter, L. The provisions of the statutes of Ann were in substance adopted by an act of the colonial legislature of 1748. See note 19, Tucker's Blackstone 194. This court, in the case of Coleman vs. Hutchinson, III. Bibb, 211, refer to an act of our parent state, passed in 1784, which authorizes "actions of account in favor of one joint tenant, or tenant in common against another, as his bailiff, for receiving more than his just share." It may, therefore, be safely laid down as the law, that a joint tenant or tenant in common, who commits waste, or who receives more of the rents and profits than comes to his share, (to be apportioned according to his interest in the estate,) is liable to his co-tenant for the waste or for the excess of rents and profits above his share, under the statutory provisions aforesaid.

If one tenant in common, or joint tenant enter upon land yielding no rent and improve the same, by his money or labor, the co-tenant expending neither money nor labour, he is entitled to the exclusive benefit of

But when the estate, at the commencement of the joint tenancy or tenancy in common, yields no rent or profit, and one of the tenants enters, and by improving the estate renders it productive, can the co-tenant, who expends neither money nor labour, come in and claim a share of the profits? This seems to be the question in the present case. The record does not shew that the appellees, or their ancestor, made any improvements upon the land: on the contrary, all the improvements appear to have been made by the appellants and those holding under them, or by persons who were not tenants, and who paid no rents to the appellants. Under these

circumstances, we do not perceive the principle upon which the appellees, or their ancestor, as a co-tenant in common, can claim rents. It is clear that it could not be done at common law: nor is there any thing in the statute of IV. Ann. c. 16, or the acts of Virginia, which can sanction the claim to rents by the appellees or their ancestor.

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the rents or  
profits thus  
produced.

These statutes were not designed to create a right in favour of a co-tenant who expended nothing, to share the profits resulting from the money or labour expended by his companion; but they were intended to give a remedy, by which the profits of the estate, growing out of its condition when acquired, or which the estate yielded, or would yield, independent of any extraordinary expenditure by the party receiving the profits, might be apportioned according to the interests of the co-tenants, and the receiver compelled to account to his co-tenant for his share. Thus the statutes enforced no more than was required by the principles of morality.

The statutes of Ann and of Virginia give a remedy for the recovery of profits growing out of an estate from its condition when acquired, or produced by the joint labor or expenditure of the co-tenants.

If A. and B. are tenants in common of an unimproved large tract of land, A. has an unquestionable right to enter upon and improve it, by making a farm thereon. If he leaves a full portion of its value, in its unimproved state, to satisfy the interest of B. on partition, it would be unjust to permit B. to claim the part improved by A. or to insist that the enhanced value of the land, owing to the improvements made by A. should be taken into consideration in making the partition. If, for instance, the tract contained 1,000 acres, worth, in its unimproved state, \$10 per acre, and was susceptible of an equal division in value, by laying it off in two lots of 500 acres each, then complete justice would be effected in the partition, (the tenants in common holding equal interests,) by assigning to B. 500 acres of land in its unimproved state. If the improvements made by A. were worth \$5,000, the whole tract as improved would then be worth \$15,000. By giving to B. in the partition, half the value of the whole tract as improved, and making up his share in unimproved land at \$10 per acre, he would get 750 acres, leaving 250 only for A. including his improvements. Thus A. in consequence of his labour and money expended in improvements, would lose

On partition between joint tenants, or tenants in common, one having entered upon the land and improved it, he will be protected by the court, and his improvements assigned to him if practicable—making no allowance in division for the enhanced value of the land.

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HEIRS

GLAY'S HEIRS

250 acres of land, worth 10 per acre, which he would have obtained had he acted like B. and made no improvement upon the estate held in common. Such a case need only be stated to present the glaring injustice of a partition upon such principles. In practice our courts have uniformly protected the improvements, made by joint tenants or tenants in common, by causing them to be assigned in the partition to the tenant making them, without giving the other tenant any advantage in the division in consequence of the enhanced value of the land resulting from them. The propriety of this rule is recognized in the decree, for it directs that the rule shall be observed if practicable. But it was found, that a just portion of the lands could not be allotted to the appellees, without including improvements made by the appellants, or those holding under them.

If in partitioning land it cannot be so divided as to allot unimproved land to such joint tenant, or tenant in common, as may not have contributed to the improvement, still he will not be entitled to charge his co-tenant rent for the portion of improved land which he may obtain, nor has the improver a right to charge for the improvements.

We perceive no reason for allowing the appellees rents, merely because they happened to get a portion of the improvements in the division. If, by the improvements, the land was made more valuable, then by getting improved land, the appellees have been benefitted by the labor of others, without paying an equivalent. How they should be entitled to demand rent, upon any principle of morality or law, when they were not entitled to any improvements, if it had been possible to make an equal partition of the land, regarding it in its unimproved state, we cannot perceive. If one joint tenant, or tenant in common, covers the whole of the estate with valuable improvements, so that it is impossible for his co-tenant to obtain his share of the estate without including a part of the improvements so made, the tenant making the improvements would not be entitled to compensation therefor, notwithstanding they may have added greatly to the value of the land; because it would be the improvers own folly to extend his improvements over the whole estate, and, because it would be unjust to permit a co-tenant, at his pleasure, to charge another co-tenant with improvements, which the individual charged may not have desired. In such a case the improver stands as a mere volunteer, and cannot, without the consent of his co-tenant, lay the foundation for charging him for improvements. If compensa-

tion for improvements, thus made, cannot be recovered, we do not see how the maker of them can be required to pay rent, or the profits arising from his labor and money, voluntarily expended for the advantage of another. We think he has lost enough by the folly of making valuable improvements for which he cannot obtain compensation. The doctrines growing out of our occupant laws do not apply to this case.

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The only plausible ground upon which we would place a claim for rents on the part of the appellees is, that the appellants had irregularly resisted a partition, and had actually disseized the appellee, or their ancestor. Upon scrutinizing the facts, we cannot place the claim for rents upon any such foundation. On the contrary, it seems to us that the appellants have been anxiously endeavoring for years to effect a partition of the land, and that the ancestor of the appellees has been resisting their efforts and denying their right to partition.

So much of the decree, therefore, as directed the payment of \$838 67 by the appellants to the appellees for rents is erroneous. Even if it had been proper to allow rents, we cannot perceive how the failure to pay the amount decreed for rents justifies the dismissal of the bill, and the refusal of the court to carry the partition made into full effect, by requiring the appellees to convey the title to the appellants for their part of the land.

The decree is, therefore, reversed, and the case remanded with directions to enter a decree in conformity to this opinion.

It seems that since the appeal was made, a part of the appellants have compromised with Clay's heirs, and a dismissal of the appeal was the consequence. The order of dismissal on the application of part of the appellants upon affidavits filed was set aside, and this has produced some difficulty in giving a proper disposition of the cause, as only part of the appellants persevere in prosecuting the appeal. When we consider that the dismissal of the bill in the circuit court was without prejudice, and that all parties, if that dismissal remains unreversed, would stand upon their original equity, and would not be

When part of appellants compromise pending an appeal and pray a dismissal the court will only give costs upon reversal to such as pursue the appeal, notwithstanding the reversal be as to all.

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ER'S AD'ER.

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concluded by the decree, we have thought it best to reverse the decree of the circuit court, in respect to all the parties, and remand the cause. When the case returns Clay's heirs may then have an opportunity of showing that they have purchased in the shares, or compromised with a part of Nelson's heirs, in which event the circuit court will decree in favor of those only who have retained their interest.

The parties who, as appellants, prosecuted the appeal, and who are mentioned in the affidavits, and those alone, may have a judgment for their costs in this court.

*Brown and Bledsoe*, for appellants; *Crittenden*, for appellee.

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CHANCERY.

### Jones vs. Waggoner's Administrator.

Case 35.

Error to the Union Circuit; M'LEAN, Judge.

*Warranty. Eviction. Set off. Jurisdiction.*

April 6.

Chief Justice ROBERTSON delivered the Opinion of the Court.  
Judge Nicholas did not sit in this case.

JONES, the appellant, sold to Waggoner 100 acres of land, for \$200 in property—and gave him two covenants, one for a special warranty conveyance of the title, the other for a reimbursement of the consideration, with legal interest, in property, in the event of an eviction by paramount title. Waggoner paid a part of the price, and gave his bond for the residue. Sometime afterwards Jones made a deed to Waggoner for the land, containing a warranty against himself and all persons claiming under him, but without any covenant to refund, in the event of an eviction by a stranger. Higgins—a remote alienee—having been evicted by an esquirement, by a stranger, obtained a judgment against Waggoner's administrator for damages, in an action of covenant, on the privity of estate, for a breach of a covenant of Warranty in Waggoner's deed, to his immediate alienee; and Jones, the appellant, having also obtained a judgment against the same administrator, upon the bond for the residue

of the consideration, which Waggoner had covenanted to pay him for the land, this suit in chancery was thereupon instituted by the administrators, to enjoin the judgment which Jones had obtained. Higgins, and the heirs of Waggoner were made defendants with Jones.

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WAGGONER'S AD'RS.

After detailing the foregoing facts the bill alleged the insolvency of Jones—averred a failure of the consideration of the covenants on which his judgments had been rendered—and suggested that Higgins and the heirs of Waggoner were all willing that Jones' liability for damages, on his covenant to refund should be set off against his judgment. Higgins and the heirs gave their consent (in their answer) to such a decree. Jones, in his answer did not respond to the allegation of insolvency, but insisted that the covenant to refund was without consideration—that it was merged in the subsequent conveyance—that the eviction was not a paramount title, and that the circuit court had no jurisdiction.

But, upon the final hearing, the injunction which had been awarded, was perpetuated—and this appeal is prosecuted to reverse that decree.

Two questions, comprehending every subordinate point arising in the case, will be briefly considered.

1st Is Jones liable on the covenant to refund?

2d. Had the circuit court jurisdiction?

I. The covenant seems, from the proof, to have been delivered on the same day when the covenant for a conveyance was given, and it appears that the two covenants were integral parts of the same *res gestæ*. There was, therefore, a sufficient consideration for both covenants.

If two covenants be delivered at the same time, and are constituent parts of the *res gestæ*, one consideration sustains both, nor is one merged in the other when consistent and not contradictory.

The conveyance was made in compliance with the covenant for a title—contains nothing inconsistent with the other covenant, and is not superior to it in dignity. We are, consequently, not authorized to infer that this latter covenant was merged in the conveyance, or that the parties intended that the latter should waive or extinguish the former. Speed's executors vs. Hann, I. Monroe.

It appears not only that Jones had notice of the pendency of the ejectment, but also that the eviction was in consequence of a title superior to his.

Covenant to refund upon eviction by

JONES

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ER'S AD'RS.

Wherefore, Jones must be considered liable to damages, on his covenant to refund.

II. Two general objections to the jurisdiction have been urged.

paramount title, covenant-  
or has notice  
of pendency  
of ejectment  
and eviction  
by title superior  
to his, he  
is liable to  
damages.

1st. That the administrators have no right to any damages which may be assessed on the covenant to refund.

2d. That, if they have such right, the remedy was complete at law—and that a set-off should not be decreed, until after the damages had been assessed in a trial at law.

Neither of these objections should prevail.

I. The counsel for Jones insists that, if he be liable to damages on his covenant to refund the consideration to Waggoner, the covenant is real, and runs with the land; and, therefore, that either Higgins or Waggoner's heirs, in consequence of their privity, would have the legal right to damages; but that, if Higgins would not be entitled to them, the appellees would have no legal right to them; because the covenant was not broken until after the death of Waggoner.

We shall not now consume time by discussing the character of the covenant—for if it be such an one as would pass, by privity, to the alienee or heirs of Waggoner, his administrators have an equitable right to them, as Higgins and the heirs, in their answers, consent that they may be set off against the appellants judgment. Such a substitution would be obviously just, because the administrators are trustees for the heirs, and have been subjected by Higgins to a judgment for damages for a breach of Waggoner's covenant of title. If Higgins could sue on the appellant's covenant to Waggoner, his right to do so would be only a collateral security to his judgment against the appellees—and it would be proper that he should be required in equity to waive his right to sue the appellant for damages, and to permit the appellees to be substituted. So that, were it even conceded that the appellees have no legal right to the damages for which the appellant may be liable, they have obtained a clear equitable right to them, and would therefore have a right to maintain their bill in chancery.

Though a party may not have a legal right to set off yet if those who have right assent, he obtains an equitable right, and may maintain a bill in chancery to enforce it.

II. If the appellees had a legal right to the damages for which relief is sought by them, the admitted insolvency of the appellant gave jurisdiction to the chancellor, who, when he had possession of the case by injunction, had a right to retain it, and give full and final redress, by decreeing a set-off and any other relief that was proper; and who, for that purpose, had a right to assess the damages for breach of the covenant, without the intervention of a jury, the criterion being fixed by the contract and the law.

Wherefore, whether the right of the appellees to the damages be legal or not, the chancellor had jurisdiction:

And, therefore, as the decree seems to be just and proper, it is affirmed.

*Hopkins*, for plaintiffs; *McHenry*, for defendants.

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vs.  
**BROWN'S**  
ADM'R.

Chancellor having possession of a case, by injunction, will do justice between the parties, the insolvency of the defendant being admitted, he will decree a set-off against his judgment at law of damages growing out of breach of covenant, and being fixed by the contract and the law he will assess them.

## Felts &c. vs. Brown's Administrator.

CHANCERY.

Error to the Logan Circuit; BRODNAX, Judge.

Case 36.

*Administration de bonis non. Waste. Assets. Distribution.*

Judge NICHOLAS delivered the opinion of the Court.

April 5.

COMPLAINANT, as administrator *de bonis non*, filed his bill against Felts and his sureties in administration bond as a former administrator of the deceased Brown, to recover from them the amount of the assets which come to the hands of said Felts whilst administrator, and which it is alleged he converted to his own use and wasted.

The defendants below defaulted; the bill was taken for confessed, and a decree rendered against them.

The right to recover for the assets which came to the hands of the first administrator and were by him wasted, is in the distributees of Brown, and not the administrator *de bonis non*. See *Graves &c. vs. Downey*; III. Mon. 855.

The right to recover for assets wasted by former administrator is in distributees, not in administrator *de bonis non*.



LILLARD  
vs.  
FIELDS.

The decree is therefore reversed, and the cause remanded to the circuit court with directions to dismiss complainant's bill.

*Breathitt*, for plaintiffs.

ERROR.

Case 36.

## Lillard vs. Fields.

April 6.

Error to the Franklin Circuit; H. DAVIDGE, Judge.

### *Amendment. Abatement.*

What the court may amend *ex officio* will be considered done without any formal order.

Chief Justice ROBERTSON, delivered the opinion of the Court—

Thomas Lillard and Mark Lillard are plaintiffs in this writ of error, prosecuted to reverse a judgment obtained against Thomas Lillard only. The act of 1826 (Session Acts 30, Chapt. 23) authorizes this court to amend the writ, by striking out the name of the unnecessary party. And as it is a rule, that what may be amended by the court *ex officio* should, without any formal or express order of amendment, be deemed as amended *nunc pro tunc*, this writ should be regarded as a writ prosecuted in the name of Thomas Lillard alone.

Death of plaintiff in a writ of error prior to the emanation of the writ fatal on plea in abatement.

But the defendant in error has pleaded in abatement that Thomas Lillard, the plaintiff, had died prior to the impetration of the writ, and, that fact being admitted, the only question submitted to the court is, whether the writ is thereby abated?

The fact admitted, proves that the writ was false and misconceived as to the true party who should be plaintiff. This error is not amendable and is fatal.

Wherefore the writ of error must be quashed.

*Triplett*, for plaintiff; *Monroe* and *Sanders*, for defendant.

# The Commonwealth for Lee Lashbrook & Co. vs. James O Cull *et al.*

DEBT.

Error to the Mason Circuit; ROPER, Judge.

Case 36.

*Duty of Constable. Statute. Execution, void. Voidable. Evidence.*

Chief Justice ROBERTSON, delivered the opinion of the Court. April 6.  
Absent Judge Nicholas.

THIS is an action of debt against O' Cull and his sureties, on his official bond as constable of Mason county, for his failure to execute and return two writs of fieri facias, which had been issued by a justice of the Peace of Fleming county, in favor of the relators, and delivered to him whilst in full force.

On the trial, on the general issue, the circuit court instructed the jury that, as the defendant in the executions resided in Fleming, and no fact had been shown (according to the act of 1827) which authorized the issuing of them to Mason, the constable was not responsible for failing to obey their mandate; and thereupon a verdict and judgment were rendered in bar of the action.

This instruction presents the only point which is material, and as it clearly appears that the executions were improvidently directed to Mason county, the only thing to be determined is, whether that circumstance shall exonerate the officer from liability for failing to levy or return them after he had received them.

The executions were not void. *Ognell vs. Paston*, Cro. El. 165; *Bush's Ca. Ib* 118; *Burton vs. Eyre*, Cro. Ia. 289; *Shirley vs. Wright*, I. Salk'd 273; *Campbell vs. Cummins et al*, II. Burr, 1187; *Carmer vs. Van Alstyne*, IX. Johnson's Reports 386; *Wilson vs. Huston*, IV. Bibb 332; *Blaine vs The ship Charles Carter*, IV. Cranch 332; *Scott vs Shaw*, XIII Johnson, 378.

The analogy between the foregoing cases and this case is sufficient to shew that these executions were only irregular—and such seems to be the effect of the decision of this court in *Cox vs. Nelson*. I. Mon. 94.

An execution issuing to a county in which the defendant does not reside, the provisions of the statute of 1827, not having been complied with, is irregular, but not void. The defendant in execution may avoid it, but until he does, it is obligatory, and an officer who may have re-

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<sup>vs</sup>  
O'CONNELL *et al.*

ceived it, is liable to the penalties of the law if he fail to comply with its mandate.

Constable a ministerial, not a judicial officer; his duty to obey the execution, not to decide on its validity.

An officer is not bound to obey a void process, nor will it justify him for any act done or attempted by him in enforcing it. But a process merely irregular or erroneous will be a good justification to the officer for whatever he may have done rightly in obedience to its mandate—because his province is ministerial and executive, and it is therefore not his *duty* to decide on the regularity or mere erroneousness of a judgment or of any process directed to him for enforcing it. But whether any irregularity or mere error in the judgment or execution will exonerate the officer from all common law liability for failing to levy or return the execution, is not precisely the same question. In *Wilson vs. Huston* (Supra) this court decided that the fact that an execution had been made returnable to a day more remote than any prescribed by law, was no answer to a motion against the officer (who received it) for the statutory penalty for failing to return it. But that case and this are not perfectly analogous.

1st. When an officer receives an execution, it may be his duty to return it (if not void) even though he may not have been bound to levy it; and in this case the suit is brought for failing altogether to execute.

2d. The liability to a penalty for failing to return an execution within a month from the return day is fixed by statute, but whether an officer be liable, in an action of debt, on his official bond, for failing to levy or return an irregular execution, must be tested by common law principles.

Therefore, although the case of *Wilson vs. Huston* is an imposing authority against the judgment of the Circuit Court, it is not conclusive. But we have not been able to find any authority for excusing the constable; and his legal liability seems established not only by *Wilson vs. Huston*, in IV. Bibb, but also by strong analogies.

In some of the cases already cited, and in many others, it has been uniformly decided in England that if an officer, *after levying a ca. sa.* permit the prisoner to escape, the mere irregularity or erroneousness of the execution will not bar an action by the plaintiff in the execution for damages for the

escape. One reason assigned for the decision is, that the execution would be a sufficient shield to the officer for the capture and imprisonment, and, therefore, he should be required to keep the prisoner safely. But in *Ognell vs. Paston* and *Scott vs. Shaw*, and many other cases, a more direct and specific reason is suggested—that is, *that an irregular process is voidable at the instance of the party only—that it is good until so avoided—and that it is not allowable to the officer to whom it is directed to dispute its authority or take advantage of its irregularity*, as it will be a justification to him. It seems to us that this reasoning contains the true principle—and we can perceive no reason why an irregularity in the process should excuse the officer for disobeying it altogether, when, as must be conceded, the same irregularity would not excuse an escape.

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The same principle must equally apply to both cases. That is, that the defendant in the execution may or may not take advantage of the error or irregularity—that the officer must not presume to decide upon it—and that, therefore, if it be not avoided, his only duty or privilege is to obey its mandate. The only reason why an irregular process will be a good justification to the officer for enforcing it, must be because it is his duty to enforce it unless the party avoid it.

It is true that, as between the plaintiff and defendant to an irregular execution, it will be deemed so far void that the defendant may recover damages against the plaintiff for enforcing it, because he (the plaintiff,) was privy to and should be responsible for the irregularity. But it is equally true that a plaintiff would be responsible to a defendant for enforcing an irregular judgment by a regular execution—and, in such a case, surely a ministerial officer would not be excused for refusing to obey the execution, merely because the judgment was obtained irregularly, but would certainly incur, by his delinquency, liability to the creditor in the execution; because, if he had executed the process, the creditor might have thus obtained the full benefit of his judgment, and the defendant in the execution may have acquiesced, and never attempted to take

Plaintiff in execution responsible to defendant for enforcing irregular execution, on regular judgment, in like manner, as he would be for enforcing irregular judgment, by regular execution.

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advantage of its irregularity. The same reason applies with full force to an irregular execution.

In an action for escape, the plaintiff must shew a valid judgment as well as execution; not because such a judgment is necessary to the justification of the officer for levying the execution, but only because the plaintiff can have sustained no injury by the escape, unless he had a judgment; and consequently should not recover damages without shewing a judgment.

But whenever a judgment has been rendered by a court of competent jurisdiction, it is the duty of the officer, to whom process upon it is directed, to obey its mandate, and by negligently or perversely failing, he does an injury to the judgment creditor and is guilty of a breach of his official bond, for which an action may be maintained.

Irregularity of execution may be given in evidence in mitigation of damages, but is no bar to an action for failing to obey its mandate.

The irregularity in the execution may be admissible evidence in mitigation of damages, but not to bar the action. How far the facts agreed in this case should mitigate the damages, a jury will determine, when they decide to what extent the relators have been injured by O'Cull's failure to levy or return the execution. They are entitled to nominal damages at all events, and may possibly be entitled to the whole amount of their executions. The extent of the injury may depend on facts which do not appear in this record.

Judgment reversed and cause remanded for a new trial.

*Crittenden*, for plaintiffs; *Beatty* for defendants.

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## Blair vs. Perry.

CHANCERY.

Error to the Franklin Circuit; H. DAVIDGE, Judge.

Case 39.

*Warranty. Eviction.*

April 6.

Judge UNDERWOOD, delivered the opinion of the Court.  
Judge Nichol did not sit in this case.

In 1814, Perry executed a deed purporting to convey Blair a part of out lot No. 4, in

Frankfort. The deed warrants the title against all other claims. Shortly after the execution of this deed, Blair filed a bill against the heirs of A. Holmes and others, suggesting that the title was in said heirs, and praying that they might be compelled to convey to him. Such proceedings were had in this suit as eventuated in a decree requiring the heirs of Holmes to convey to Blair. A commissioner was appointed to make the conveyance. The record states that he reported a deed to the court, which was approved. The decree was rendered in March, 1821. In 1823, Blair filed a bill against Perry, suggesting, that he was compelled to pay the heirs of Holmes \$140 before he could obtain the title, that being the purchase money and interest, due them as the representatives of their ancestor, for the lot, and which had not been paid. He, therefore, asked a decree against Perry for the amount. In 1828 the circuit court dismissed the bill with costs, and this is the decision which is sought to be reversed.

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vs.  
PERRY.

The decree must be affirmed, for many reasons. It does not appear that there has been any breach of Perry's covenant. No eviction has taken place. Blair has not been disturbed in his possession and enjoyment. The Court did not decree that Blair should pay the heirs of Holmes any thing. It does not appear that they could have recovered either land or money. It is a reasonable inference, from all the facts stated, that there has been such a continued adverse possession, as would completely protect Blair, holding under Perry and his vendors. It does not appear that Perry was guilty of any fraud. Perry was no party to the compromise between Blair and the heirs of Holmes. Under these circumstances, any payment made by Blair to them, or their attorney, for their use, cannot be regarded in any other light than as a payment made without the sanction or request of Perry, and such an one as imposes no legal obligation upon him to remunerate Blair.

Bill to recover from vendor, by deed with warranty, the purchase money alleged to have remained due original claimant of lot. Bill dismissed, there having been no eviction of vendee, nor decree or judgment of court compelling him to pay, nor proof that it was at the request of the vendor.

Wherefore, the decree is affirmed with costs.

*Monroe*, for plaintiff; *Triplett*, for defendant.

MOTION.

## Smith vs. McGlasson.

Case 38.

Error to the Campbell Circuit ; H. O. BROWN, Judge.

*Service of Process. Pleading.*

April 7.

Chief Justice ROBERTSON, delivered the Opinion of the Court.

SMITH, having declared against McGlasson for trespass, and the writ having been executed, August 6th, 1829—afterwards, at the April term, 1830, of the circuit court, the parties having appeared by their attorneys, the court, on motion made by the defendant, dismissed the suit: because, as appeared by the exhibition of a copy of the record of conviction, he had been convicted, July 31st, 1829, of felony, and *stated* that, when, the writ was executed, he was in the custody of the sheriff, as a convict.

Service of writ on party convicted of felony valid. H. Dig. 1223.

The authority for the judgment of the circuit court is not perceived. McGlasson was as subject *after* conviction as *before*, to a civil suit; and the notification (by the service of the writ) of the suit against him, was as effectual as it would have been if he had never been convicted. Such should be deemed to be the object and effect of the 5th section of an act of 1802. II. Dig. 1223.

If any extraneous fact to render service of a writ illegal, it should be pleaded, so that its truth might be tried.

But if any extraneous fact existed, which rendered the writ, or the service of it, illegal, or which could have the effect of abating it, such fact should have been pleaded, so that an issue as to its truth might have been made up and properly tried.

The plaintiff objected to the motion, and to the dismissal of the suit by the court—and it does not appear that the judgment is sustained by any thing in the record.

Wherefore, the judgment of circuit court is reversed, and the cause remanded.

*Denny*, for plaintiff; *Haggin*, for defendant.

**Richardson vs. Flournoy.**

DEBT.

Error to the Scott Circuit; T. M. Hickey Judge.

Case 39.

*Security. Responsibility. Endorsement. Action.*  
*Interest.*

Chief Justice ROBERTSON delivered the opinion of the court. April 7.

FLOURNOY sued Richardson, in debt, for \$100, on the following obligation:—

“For value received, I promise to pay David Flournoy the sum of eight hundred and one dollars, to be paid at the expiration of six years from the date hereof. Witness my hand and seal this 14th of July, 1814.

\$801.

JOSIAH PITTS, (seal.)

Teste,

*Thomas C. Flournoy.*

Endorsed, “So far as \$100 I hold myself bound as the security of Mr. Josiah Pitts.

SAMUEL Q. RICHARDSON.

14th July, 1814.”

The circuit court overruled a demurrer to the declaration, and thereupon gave judgment against Richardson, by default, for \$100, and six per cent. interest thereon “from the 14th of July, 1820, till paid.”

Two objections only have been made to the declaration—1st. It contains no averment of Pitt’s insolvency. 2d. Covenant, and not debt, was the appropriate form of action.

I. The undertaking by Richardson must be deemed a direct and original agreement by him to pay Flournoy \$100. His obligation and that of Pitts seem to be of the same date. They must, therefore, be considered as simultaneous in their origin, and as parts of the same entire contract; and consequently Richardson’s obligation is precisely that of an ordinary surety, severally bound with his principal in the same obligation—with this difference only, that Richardson is bound only for \$100, and Pitts is bound for \$801.

Endorsement by A. B. that he holds himself bound for promisor in note as security, for a part of the sum stipulated to be paid, is to be taken as an original undertaking for the amount specified by the endorsement,

Richardson was willing to be surety to the extent of \$100; and if the entire obligation of Pitts had



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not exceeded that sum, it may be inferred that both of them would have signed it together as joint obligors.

& a direct obligation, to the holder, is incurred to pay that sum when the note becomes due, whether the drawer be solvent or insolvent;

Wherefore it results that Richardson was liable to suit for \$100, as soon as the entire debt became due, and that it was not material whether Pitts was solvent or not, or had been sued or not.

II. It is also a consequence of this view of the case, that debt was an appropriate action—and that it was proper to render judgment for current interest, to commence when the debt first became due—to-wit: 14th July, 1820.

Debt the proper action, and interest to be allowed from the time the debt becomes due.

Judgment affirmed.

*Brown and Denny, for plaintiff; Morehead for defendant.*

CHANCERY. **Edward Dorsey's Representatives vs. Ann Dorsey.**

Case 40. Appeal from the Washington Circuit; P. J. BOOKER, Judge.

*Appearance. Antenuptial contract. Auditor. Evidence.*

April 7. Chief Justice ROBERTSON, delivered the opinion of the Court.

IN 1812, Edward Dorsey, in consideration of a contemplated intermarriage between himself and Ann Boyd, which shortly afterwards was consummated, covenanted that she should retain and control, in all respects as a feme sole, "the land and slaves" owned by her at the date of the covenant. After living together until about the year 1818, they separated, and never again cohabited with each other. In 1823, she filed a bill for a divorce, and for the appointment of a trustee to hold and preserve to her use, the property intended to be secured by the antenuptial agreement. In 1824, she filed a separate bill for enforcing the agreement and for the preservation, in the mean time, of the property which it described.

Before the latter Bill had been answered, Edward Dorsey died intestate. Prior to his death the two bills had been consolidated. At the first term succeeding his death, the following entry was made on the record:

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"On the 12th day of August, 1824, came the parties, by their counsel, and the death of the defendant was suggested to the court, by his counsel—whereupon, by consent of all parties, it is ordered that this suit be revived against the administrator and heirs of the decedent"—[naming them individually]—"and, by consent of all the parties, the following decree is to be entered—to wit:

"It is ordered and decreed that the defendants surrender to the complainant, *all the property of every kind which they have in their possession, and which belonged to the complainant before her intermarriage with Edward Dorsey, deceased.* It is further decreed and ordered that complainant relinquish to the defendants all claim, right, title, and interest which she may derive and be entitled to out of the estate of Edward Dorsey, as the widow of said Edward Dorsey. It is further ordered that the balance of the matters in dispute between the parties, be left to the arbitration and award of Wm B. Booker and Dabney C. Cosby, esqrs. And, by the further consent of the parties, it is decreed, that the complainant account for all debts which she owed before her intermarriage with Edward Dorsey, and also all legal costs of suit by Edward Dorsey, since the marriage, in and about the transaction of her business in courts of justice."

At the May term, 1826, the appearance of "*the parties*" was noted, the order of reference set aside, and the cause continued. At the November term, 1826, *a bill of revivor was filed against the administrators of the original defendant.* At the May term, 1826, the following entry was made.

"On motion of complainant, by her counsel, ordered that, this cause be revived and carried on against Robert Dorsey and John H. Geohagen, administrators of the defendant, who hath departed this life."

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At the November term, 1829, the following entry was made.

"Came *the parties* by their counsel, whereupon it is ordered that John Hughes, jr. be appointed commissioner to state and report the *unsettled* claims of the complainant so far as they are open for adjudication." After the auditor had reported, a decree was rendered in favor of the appellee for \$789, against the administrators and heirs of the decedent, Edward Dorsey. To reverse that decree this appeal is prosecuted.

Two questions are presented. 1st. Were the appellants, or any of them made parties? 2d. Is the decree right on the merits?

Appearance.

I. Although the circuit court may have intended to shew, by the entry made in August, 1824, that the appellants voluntarily entered their appearance, this court cannot judicially construe the record as importing, with sufficient certainty, any such appearance by them at that time. But as an order had been made for reviving the suit against the appellants, the entry made at the subsequent May term, 1826, stating that *the parties* appeared, should be understood as meaning that the appellants appeared, because, if they were not considered parties, the entry, that the parties appeared, was not true, there having been no revivor against any other person, after the abatement. And the entry made in November, 1829, not only imports an appearance by the appellants, but also a recognition by them of the consent decree. And hence it might, if it were material, be inferred from all the entries, taken together, that the appellants had appeared and consented to the revival against them in August, 1824. Therefore, though the proceedings seem to have been unaccountably irregular, we feel no hesitation in deciding that the appellants were all made parties in the circuit court as early as the November term, 1829, if not sooner.

II. As the appellants had appeared prior to any bill of revivor, and as the consent decree seems to have been valid, and, of course, conclusive on the parties, the circuit court did not err in refusing to

permit the administrators to file an answer at the August term, 1830, especially as the answer then offered could not, had it been admitted, have essentially effected the case.

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Had there been no decree by consent the appellee would be entitled, even were the answer filed, to a decree for enforcing the covenant, as against the representatives of the covenantor. And she might have asserted legal claims, (resulting from the marriage,) which she surrendered in the consent decree, and have remained exempt from liabilities which she has thereby assumed. It would appear, therefore, disadvantageous to the appellants, to have that decree set aside, and this court does not feel authorized to set it aside. But, in carrying into effect so much of it as was executory and open to further controversy, the circuit court has, in some respects erred.

Edward Dorsey was not liable for the use of the slaves, whilst the appellee lived with him, and voluntarily permitted him, jointly with herself, to enjoy the use of them. The covenant, assured to her the right to appropriate to herself the exclusive dominion and use of the land and slaves. But when she chose not to exercise the one or enjoy the other, but preferred a joint use by herself and her husband, he was surely not liable to her for the value of such use.

Although the husband has by an antenuptial contract agreed that the wife may retain & control, in all respects as a *feme sole*, the land & slaves owned by her before the marriage, yet if she permit the husband to enjoy jointly with herself the use of the slaves, she cannot recover from the representatives of the husband the value of the use of them by the husband.

It does not appear from the facts, as now exhibited, that the appellants should be held accountable for the use of any of the slaves by Edward Dorsey, except for the use of one named John, retained by him after the final separation from the appellee. The amount decreed by the circuit court is altogether for the use of the slaves, and exceeds the maximum which should be decreed for the use of John, since the separation. The last decree is, therefore, erroneous on the merits.

But, in remanding the cause, it is proper to notice an error to the prejudice of the appellee.

Although the covenant included no other estate than land and slaves, yet the consent decree com-

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prehends "*all the property of every kind,*" which the appellants had in possession at the date of that decree, and which had belonged to the appellee prior to the marriage. The restoration of the personal property derived from her, and which had not been consumed, but remained in the possession of any of the appellants (if any such did remain) may have been the chief consideration for relinquishing rights and assuming liabilities, as the appellee did by the consent decree, and as to which she is concluded by that decree. She should also have the full benefit of so much of it as may be advantageous to her. But in the last decree, rendered on the auditor's report, the circuit court allowed nothing farther than negro hire.

On the return of the case, the circuit court, if it shall be ascertained that the appellants were, at the date of the consent decree, possessed of any chattels which the appellee owned at the time of her marriage with Dorsey, such chattels, or the value thereof, should be decreed to her.

Auditor required to report to the court all the testimony heard by him or presented to him.

And, as the parties preferred that all the litigated facts should be reported by an auditor, the circuit court may again appoint an auditor for that purpose, instructing him specially concerning the facts to be ascertained, and the manner of auditing them, and requiring him to report all the testimony heard by him, or presented to him.

Decree reversed, and cause remanded for further proceedings consistent with this opinion.

*Cunningham* and *McHenry*, for appellants; *Rudd* for appellee.

**The Commonwealth, for the use of  
J. & C. Cooper, vs. Bartlett's Exr's.**

DEBT.

Appeal from the HENRY Circuit; DAVIDGE, Judge.

Case 41.

*Constable. False Return. Declaration. Money collected on Execution. Special Demand.*

Judge UNDERWOOD delivered the opinion of the court.  
Judge Nicholas did not sit.

April 7.

Two questions are presented for consideration; first, is the declaration good? if so; secondly, did the court err in instructing the jury to find as in case of a nonsuit? The declaration contains two counts, to each of which a separate demurrer was filed, and likewise a general demurrer to the whole declaration. The plaintiff confessed error in the first count, and the court sustained the demurrer to it. The demurrer to the second count was overruled. The sufficiency of the second count presents the only question for our examination upon the declaration.

The action was Debt. founded upon the official bond of a constable, for whom the testator was surety. The penalty of the bond was demanded, to wit. \$2000. It was sued for in the *debet* and *detinet*. The bond with its condition is set out, and a breach of the condition is assigned by averring that various executions which are described by their dates, and the names of the persons against whom they issued, &c. were placed in the hands of the constable between the test and return day to collect, and that the "said Rowzee, the constable, failed to make true and correct returns upon said executions, and each of them, and that said Rowzee, as constable, as aforesaid, collected money on said executions, which he has failed to pay over to said plaintiff, or in any way to account for the same to the persons entitled thereto." The declaration, after the foregoing averment, concludes by averring that the other obligors in the bond sued on, had not accounted to, or paid the plaintiff or the Coopers the sums collected by Rowzee, the constable, on the executions placed in

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his hands; "but the same to pay, they and each of them hath hitherto failed, and refused to plaintiffs damage \$2000."

In a declaration against a constable, a simple allegation "that he failed to make a true and correct return on an execution," is insufficient to render him liable for a false return. To render a constable liable for a false return, the declaration should state the nature of the return made, and then charge its falsity and shew the injury resulting

We think the count insufficient. There is in the first part of the count a general allegation that Rowzee had broken the condition of his bond by failing to make due and legal returns of process placed in his hands, and by failing to pay and satisfy all sums of money by him procured upon process placed in his hands. But when these general averments are reduced to specific charges, and confined to the particular executions described, it is done in the manner already indicated by quotations from the declaration. Thus limited the misfeasance charged in relation to the returns of the execution, is that the constable "failed to make true and correct returns upon the executions." That a constable is liable for a false return will not be questioned; but to render him liable on that account, the declaration should state the nature of the return made, and then charge its falsity, and shew the injury resulting. The foregoing is entirely too loose to convict the constable of a false return; nor does it amount to an averment that the executions were not returned according to their command, or within twenty days thereafter. It would rather be inferred that there was no just cause of complaint against the constable for failing to return the executions in due time, but that the returns endorsed were false in point of fact or illegal on their face. The declaration seems not to have been formed with a view to make the constable or his surety answerable for a false return. If that was designed it is altogether insufficient.

Neither sheriff nor constables are bound to go out of their counties to pay over money collected on executions. Before a sheriff or constable is liable to be sued for money collected by him

It has long been the law, as prescribed by the statute, that sheriffs were not bound to go out of their counties to pay over money collected on executions. Before a sheriff is liable to be sued for money collected by him on executions, where the creditor resides in another county, a special demand, and his refusal thereon to pay, are essential prerequisites. The act of 1828, reducing into one the several execution laws, substantially contains in the 22d section the above provision. A correct con-

struction of the 24th section of the same act requires that the same doctrine should be applied to constables: and certainly there is as much reason for its application to them as there is to prescribe the rule for the benefit of sheriffs. We therefore conceive that it is necessary in a declaration upon a constable's bond where he or his sureties are sued for an alleged failure to pay over money collected upon executions, to aver a special demand; and that the merely formal averment of *sape requisitus* is not sufficient unless that the declaration shews on its face that the plaintiffs or relators are residents of the county or had a known agent therein, or unless such be the legal inference. Now in this case the record shows that the relators were non-residents of the State, and therefore the declaration is defective in not averring a special demand. Hence there is no ground upon which a recovery can be had even for the money which may have been collected by the constable in the present action.

The judgment must therefore be affirmed because of the defects of the declaration. If the declaration were good as it stands, still there would be no reversal, because the only proof offered was the failure of the constable to return the executions, and we have already shown that there is no count which sufficiently presented a valid claim for that cause:

The failure to state in the declaration that the executions had been endorsed, that the officer might receive bank notes in payment, &c. was not in our opinion a sufficient reason for instructing the jury as in case of a nonsuit, as the executions were sufficiently identified by the description given.

Judgment affirmed with costs.

*Richardson and Combs*, for appellants; *Monroe*, for appellee.

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on an execution, where the creditor resides in another county, a special demand, and refusal by him to pay, are essential prerequisites. In a declaration upon a constable's bond for a failure to pay over money collected upon an execution, it is necessary to aver a special demand, and the averment of *sape requisitus* is insufficient, unless the declaration shews on its face that the plaintiffs are residents of the county, or had a known agent therein, or unless such be the legal inference.



COVENANT.

**Ashby's Exr's. vs. Moore's Adm'x.**

Case 42.

Error on the Fayette Circuit; Hickey, Judge.

*Warranty, Covenant of. Administrator. Declaration. Eviction, Averment of.*

April 7. Judge NICHOLAS delivered the Opinion of the Court.

In an action by an executor on a covenant to convey land, the declaration must shew that the breach took place in the life time of the covenant.

For a breach of covenant of warranty in a deed of conveyance, the right of action is in the heir, if the eviction happens after the death of the covenantee.

When an administrator sue for a breach of a covenant of warranty, contained in a deed of conveyance of land to his intestate, the declaration must allege that the eviction took place in the life time of his intestate.

THE Defendant in error as Administratrix of Moore, sued the Plaintiffs in error as Executors, heirs and devisees of N. Ashby, in covenant, on the covenant of warranty contained in a deed of conveyance from said Ashby and J. B. January to Moore of a tract of land, and obtained a verdict and judgment.

The assignment of errors question the sufficiency of the declaration, because it does not shew that the eviction alleged took place in the life time of Moore. The case of *Abney vs. Brownlee*, II. Bibb, 170, decides, that in an action by an executor on a covenant to convey land, the declaration must shew that the breach took place in the life time of the covenantee. The case of *Hatcher vs. Galloway*, II. Bibb, 180, determines, that for a breach of covenant of warranty in a deed of conveyance, the right of action is in the heir, if the eviction happens after the death of the covenantee. An averment was therefore necessary in this case, to shew that the alleged eviction took place in the lifetime of Moore, and the declaration is bad for the want of it.

It is also objected that the declaration shews a conveyance of the land from Moore to another in whom it is contended the right of action is, as the declaration does not aver any conveyance of the title to Moore, or satisfaction made by him to the alienee. This conclusion would be just if the premises were true, but we do not consider the language of the declaration equivalent to an express averment that Moore had conveyed his title to another. If, as has been suggested, such was the fact, and in truth the eviction took place after the death of Moore, and his alienee then sued and recovered satisfaction from his administratrix, whether the right of action would or would not thereby revert and accrue to her, is a question not now presented by the record, and we do not feel at liberty to express the inclination of our opinion.

As the cause must be reversed for the insufficiency of the declaration, the other assignments of error need not be noticed. But to prevent the recurrence of similar error, we will suggest that the judgment is totally defective as to the form of it.

The judgment is reversed and cause remanded to the circuit court for further proceedings consistent with this opinion. The plaintiffs in error must recover their costs.

*Turner and Haggin for plaintiffs; Chinn for defendants.*

## Snodgrass, &c. vs. Adams.

Error to the Rockcastle Circuit. Evr, Judge.

Case 43.

*Amendment. Pleas, Filing of.*

Judge NICHOLAS delivered the Opinion of the Court.

April 7.

At the April term, 1829, of the Rockcastle Circuit Court, the defendants tendered two pleas in bar to plaintiff's action, to which he demurred; the demurrers were joined; the pleas adjudicated on by the court and the demurrers sustained. The clerk, however, totally omitted to notice on the record the filing of the pleas, demurrers, or adjudication of them, and judgment was entered as by default on enquiring of damages. At the next term of the court these facts were abundantly proved, and the clerk in addition, stated, that before entering judgment, the pleas, &c. had been lodged with the papers in the cause, and there remained ever since. The defendants then moved that the record might be amended so as to shew the filing of the pleas, &c., which the court refused to permit. The case here depends on the propriety of this refusal.

Amendments are usually allowed in affirmance of judgments, seldom or never to destroy them. III. Salk. 29 After the term at which a judgment is rendered, the court has no longer any power to alter or amend the record, unless there be something on the record

**SKODGRASS, vs. ADAMS.** the record to amend by. There is nothing of the sort here on which to found an amendment. This, like many other of the general rules of law, may no doubt operate injuriously in individual cases. But the rule is a wise one and inflexible. The general interests of society in many important particulars depend most nearly upon the preservation of the purity and verity of our public records. A rule so necessary to their inviolability cannot be made to yield for instances of individual hardship. See *Conn vs. Doyle* II Bibb, 248.

could not be so amended as to shew the filing of the pleas, &c. After the term the judgment is rendered, the court has no power to alter or amend the record, unless there be something on the record to amend by.

Judgment affirmed with costs.

*E. Smith* for plaintiffs; *Owsley* for defendants.

## Arduary and sureties vs. Commonwealth, for use of Moore.

**Case 44.** Error to the Bourbon Circuit **FRENCH, Judge.**  
*Fee-bills. Ten per cent. interest. Sheriff. Sureties. Penalty.*

**April 10.** Chief Justice **ROBERTSON** delivered the Opinion of the Court.

In a suit against sheriff and his sureties for damages for his failure to account for fee bills delivered to him for collection to render a judgment for ten per cent. interest on the damage assessed by the jury is error.

The alleged defect in the declaration was cured by the verdict and the plea and issue which presented for trial the fact omitted in the Count. The Circuit Court did not therefore err in over-ruling the motion to arrest the judgment.

But the judgment itself is erroneous. The suit was brought by the relator against a sheriff and the sureties in his official bond for damages for his failure to account for fee bills which had been delivered to him for collection, and the Circuit Court gave judgment for 10 per cent. interest on the damages assessed by the verdict.

The 29th section of an act of 1796 (1st Digest, 577) authorizes a judgment on motion against a sheriff for failing to account for fee bills placed in his hands for collection. The 5th section of an act of 1808, is as follows:—"When judgment shall be rendered against a sheriff or against a sheriff and his deputies for fee bills put into his hands for collection,

Statute which gives ten per cent. interest against the sheriff, for

and not accounted for, it shall be lawful for the judgment to be entered as to make the principal sum bear interest at the rate of 10 per cent. per year from the day on which it should have been paid until payment shall be made."

The section thus quoted is penal, and construed as it should be, strictly, does not apply to the sureties. It denounces a penalty against the *delinquent* officer to stimulate him to the punctual performance of his duties; but his sureties are not made liable for such penalty. By their bond they become liable for the full measure of a cheat, damage or injury resulting to a party from the official delinquency of their principal, but not for any penalty incurred by him, and intended for the punishment of him who had been guilty of official misfeasance or nonfeasance, and not of those who were passive and innocent, and upon whom no duty was devolved.

In a motion or proceeding against the sheriff or his deputy the ten per cent. may be adjudged against him.—But in a common law suit against the sureties on their bond, a greater sum than the damages assessed by a jury cannot be adjudged. The statute applies not only to the officer alone, but to a proceeding against him alone.

In this case the judgment should be joint, and, as the sureties are not liable for the ten per cent. no judgment for that penalty can be legally rendered even against the principal in the suit. If the relator desired to enforce that penalty he ought to have proceeded against the sheriff alone, according to the statute.

Wherefore the judgment is reversed and the cause remanded, with instructions to render judgment on the verdict according to the rules and principles of the common law.

John Trimble, for plaintiffs; Crittenden, for defendant.

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failure to account for fees bills put into his hands for collection, is penal, and does not apply to or comprehend his sureties. In a motion or proceeding against a sheriff or his deputy, for a failure to account for fees bills put into his hands for collection, ten per cent. interest may be adjudged against him, but in a common law suit against his sureties on their bond, a greater sum than the damages assessed by a jury cannot be adjudged against them in a suit against sheriff and his sureties for a failure to account for fees bills put into his hands for collection, if the judgment should be joint, the ten per cent. interest on the amount of the fees bills, cannot, in such case, be adjudged even against the sheriff.

CHANCERY. **Wm Haden et al. vs. James Haden's  
Heirs, &c.**

Case 45.

Error to the Logan Circuit; BRODNAX, Judge.

*Distribution. Hotchpot. Practice Parties.*

April 10.

Chief Justice ROBERTSON, delivered the opinion of the Court.

SOME time prior to December, 1820, William Haden, sr. died intestate, in Logan county, in this state, leaving an estate in land, slaves and chattles, and leaving a widow and eleven children.

In December, 1820, the county court of Logan appointed commissioners to divide among the children of the decedent, his land and slaves. The commissioners made no division of land, and distributed only such of the slaves as had not been assigned to the widow for her dower. To most of the children the intestate had made advancements in his lifetime, of land, slaves and chattles to some, and of slaves and chattles only to others. All of those (except William Haden) to whom land had been advanced, refused to bring into hotchpot what they had received, and waived their right to the slaves then distributed, but reserved a right to distributive interest in whatever estate might afterwards be distributed. The slaves whom the commissioners distributed were consequently assigned to those who consented to the hotchpot—that is, to William Haden, Porter and wife Benjamin Haden, Sally Haden, the children of Mrs. Proctor—the children of Mrs. Whitset. None of these, except William Haden, had received any land: and the commissioners distributed the slaves among them in such a manner as to equalize the total value of the entire estate which each had received; and consequently, as Wm. Haden's land was taken into consideration in the distribution, he received less than any of the others from the commissioners—the interest allowed to him being only \$18.83, whilst that assigned to some of the others exceeded \$1100.

In 1125, (the widow having died in the mean time) this suit in chancery was instituted by William Haden, Porter and wife, and Wilson and wife, for distribution of the dower slaves and of the land.

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All the parties, except the heirs of James Haden, express perfect acquiescence in the distribution made by the commissioners, and an unwillingness to disturb it. However, of those who had received land, William Haden is the only one who is willing to put it into the hotchpot—and one of them (Samuel Haden) declines all participation in the distribution of the estate.

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The circuit court disregarded the distribution made by the commissioners, and, having caused the sale of the dower slaves, decreed a distribution of the proceeds, and of the value of those distributed by the county court, and the amount of the undistributed chattles into ten shares, which the court attempted to equalize by taking into the estimate the value of advancements in slaves and chattles, and by charging the distributors of the slaves assigned by the county court with the value received by each.

This decree must be reversed.

We can perceive no sufficient reason for disturbing the distribution made by the county court, especially as, by so doing, Wilson and wife, Joseph Haden's heirs, and the heirs of John M. Haden, must take more than they asked for, or seemed to consider themselves equitably entitled to.

Although in the distribution of the slaves, the parties who had received advancements in land, were not, according to rigid law then in force, bound to account for the value of the land advanced to each of them; yet such an arrangement was not only just and equitable, but seems to have been contemplated by all the parties concerned, when the distribution was made by the commissioners, and to have been acquiesced in by all now interested, with the exception only of the heirs of James Haden; and we infer, that he himself also concurred, and during his life, acquiesced in the distribution thus amicably and equitably adjusted. Therefore, as there is no evidence of fraud or injustice in that distribution, we could not admit that it should be frustrated by the heirs of one of the parties to it. It is not now material to enquire into the motives which prompted James Haden to consent to what was done by the commissioners, and to waive his legal right to parti-

If distribution made upon equitable principles by county court commissioners, & which is concurred in by the parties to the distribution, though a party may have waived a legal right, his heirs will not be permitted to disturb such distribution, no fraud or imposition being established.

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cipate in the distribution made by them. It is sufficient that it was made with his concurrence—was never disturbed by him, and was conformable to the dictates of a sound conscience. To disturb the equalization which the county court and all the parties, then concerned, animated by a sense of intrinsic right, endeavored, as far as they could, to approximate, would be manifestly unreasonable and unjust.

If some of distributees account for advancements, as between such the whole estate of slaves and chattles to be distributed share and share alike. The slave fund and the chattles proper, constituting distinct classes, and to be apportioned according to the advancements in each.

The distributees, whose estates were equalized by the county court, should be deemed entitled in the final distribution, to equal shares in the total estate, whether real or personal, remaining for distribution; and are entitled exclusively to any land subject to partition, as the other four distributees are unwilling to be charged with the value of advancements made to them or their ancestors in land.

But in the distribution of the slaves and chattles proper, which yet remain undistributed, the rule established in ordinary cases of distribution by this court, must be applied to Wilson and wife, Joseph Haden's heirs, the heirs of John M. Haden, and those of James Haden; as between them the value of advancements, first in slaves and then in other chattles should be estimated, and distribution of the slave fund and of the chattles proper, as constituting distinct classes, should be made accordingly. The amount advanced to each of the ten distributees in slaves and other chattles, and the amount which each shall have received since the distribution by the county court should be ascertained, and the portions of each fund, to which Wilson and wife, Joseph Haden's heirs, the heirs of John M. Haden, and those of James Haden shall thus be entitled to receive, should be assigned to them respectively, according to the law of distribution; and the residue of those two distributable funds, and the land remaining for partition should be divided into six equal parts, and assigned to the other six distributees—Samuel Haden being unwilling to account for advancements made to him, will be entitled to nothing in the distribution; and the slaves distributed by the county court should not be taken into consideration, as between those who received them and those who

He who refuses to enter into hotchpot is entitled to no distributive share; nor is he who waives his

waived their rights to any portion of them; but in ascertaining what the latter four distributees are yet entitled to, the estimate should be made as if there never had been such slaves to distribute, or as if they had been equally divided among all the ten distributees.

The ratio thus indicated for the final distribution will accord with what had been done justly and satisfactorily, and is the only one which can, in our opinion, prevent derangement or injustice. Those who had waived their claims to shares in the slaves distributed by the county court, will have no cause to complain of such a distribution of the remaining estate as we have suggested; for even according to that mode they will have received more, in the aggregate, of the estate of William Haden, deceased, than others of his heirs can obtain.

To ascertain the aggregate fund remaining for distribution, the report hitherto made by an auditor may be consulted, as to that matter, unless it should be disregarded upon sufficient objections which the parties may be allowed to make to it on the return of the case to the circuit court. As James Haden was the administrator of Wm. Haden, deceased, his personal representative should be a party—and the distributable fund undisposed of in his hands, as well as that remaining in the hands of Wm. Haden, the administrator *de bonis non*, should be ascertained and considered in the final distribution.

Decree reversed and case remanded for such further proceedings and decree as shall become proper according to this opinion.

*Crittenden*, for plaintiff; *Breathitt*, for defendant.

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right upon partial distribution, to have slaves then distributed afterwards

When case is reversed the Auditor's report is subject to objection, and may be set aside, tho' reversal not based upon defective report.

Personal representative of administrator of decedant should be party to writ for distribution of decedant's estate.

## Harrison vs. Lee, &c.

CHANCERY.

Error to the Christian Circuit; SHACKLEFORD, Judge.

Case 46.

*Non est factum. Jurisdiction. Injunction. Defence. Damages.*

Judge UNDERWOOD, delivered the Opinion of the Court.

April 10.

ACCORDING to the principles settled in *Mershon vs. the Bank of the Commonwealth*, at the note or obli-

Fact that the



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gation which was the foundation of the common law action, and on which a judgment has been obtained, was not the act and deed of the defendant; the action, will not, *per se*, give the chancellor jurisdiction to enjoin the judgment.

When the note or obligation sued on is not the act and deed of the defendant, he should defend himself *at law*.

Damages should be allowed upon the sum for which an injunction is dissolved.

fall term, 1831, Harrison could not successfully appeal to the Chancellor to enjoin a judgment rendered on a note or obligation, when he had no other grounds of equity than such as arise merely from the fact, that the writing which constituted the foundation of the common law suit was not his act and deed. Had that been the fact, it was his duty to make his defence at law. He assigns no reason for failing to do it except a reliance upon the promise of Jesse Harrison to defend for him. His plea must have been verified on oath. This was a personal matter which he should have known could not be performed by an agent, who could not possibly know whether the note or obligation had not been acknowledged and delivered as a binding instrument when the agent was not present. The excuse for not defending at law is altogether insufficient to justify the interposition of the chancellor.

But there is error in awarding damages twice. We are also of opinion that the damages awarded at the February term, 1830, are more than the defendant, Wilson was entitled to. Damages should be allowed upon the sum for which the injunction is dissolved, II. Digt. 670. Upon our calculation, we make the balance due on the 27th of February, 1830, when the injunction was dissolved, less than \$11,00. We cannot see the basis upon which damages to the amount of \$135,89 were given. Wherefore the decree of April term, 1824, giving damages, but without ascertaining their amount, and so much of the decree of the February term, 1830, as gives damages, are hereby reversed and set aside, and the cause is remanded for a decree for damages in conformity to this opinion. The plaintiff in error must recover his costs in this court.

*Morehead* for plaintiff.

**Waggoner vs. Minter et al.**

CHANCERY.

Appeal from the Erie Circuit Court; TOMPKINS, Judge.

Case 47. 121 <sup>7m 17</sup> 76*Accounts. Debts. Credits.*

Judge UNDERWOOD delivered the opinion of the Court.

April 10.

THIS is a controversy in which honest motives may very likely influence both parties; although they differ widely as to the amount which justice requires should be paid by Waggoner to Stovell, the assignee of Minter. The whole controversy turns upon the proper mode of settling a long account between Minter and Waggoner, as surviving partner of A. & G. Waggoner. On the 1st of May, 1827, the firm executed their note to Minter for \$171,39. This note was assigned to Stovell, the son-in-law of Minter, to enable him to discharge some debts of the latter for which the former was surety. Stovell adopts Minter's answer; and as Minter, notwithstanding the assignment, is still the real owner of the claim, the case will be decided as it would be were Stovell no party.

Minter in his second answer admits that the account exhibited by Waggoner "is just and correct, both on the credit and debit side, so far as the open accounts are stated." But he insists that the said account does not set forth all his demands against the firm of A & G. Waggoner, and specifies the note for \$171,39, as an omission. Minter admits that the note for \$171,39 was given in consideration of a balance due him upon a note for \$500. It seems that he held two notes for \$500, each, upon the Waggoners; that the notes were cancelled, being settled by payments, in part, and the execution of three or four new notes for the balance, and that all the notes passing between the parties, except that for \$171,39 were entered in the account between the parties, and when executed were charged by the Waggoners against Minter, and when paid were credited in favor of Minter, with the addition of interest. The circuit court supposes that this mode of keeping the account has been prejudicial to Minter, and that by making the corrections which an inspection of the account would render proper, there would be a greater balance in favor of Minter than



**WAGGONER** the outstanding note of \$171.39, and therefore the  
**vs.** injunction was dissolved with damages, and the bill  
**MINTER &c** dismissed with costs.

We do not perceive the error against Minter arising from the manner in which the notes have been introduced into the account which the circuit court supposes to exist. It appears from the account, that at the time the two notes of \$500 each are charged to Minter as a debit that the Waggoners were indebted to him for negro hire, machinery, &c. \$2826.55, and that against this sum they were entitled to credits for payments, &c. made, amounting to \$1827.46, thus leaving a balance in favor of Minter of \$999.09. There can be no doubt that the two notes for \$500, each, were intended by the parties to close the open account up to the date of said notes. For the purpose of shewing that fact, we perceive no impropriety in entering the notes upon the books of the firm as a debit against Minter, thereby shewing that so much of the open account as had before then stood to his credit had been discharged and merged in the notes. Some entry to that effect would undoubtedly be correct, for it might not be safe to let a large balance stand upon the books of a mercantile firm or partnership of any kind, when a note had been executed for that balance, lest the payee of the note might set up claim both for the balance standing to his credit on the books and the amount of the note.

The Waggoners gain no advantage by entering the notes on the account, as the circuit court supposes; on the contrary, Minter gains the interest by the operation, as will be very clear if all the notes are excluded from both sides of the account. If the settlement is made by excluding the notes as entered, both in the debit and credit side, it will then appear, that the whole amount of Minter's claim against the Waggoners, is \$2962.64, whilst that of the Waggoners against Minter for payments actually made, is \$3022.96, thus leaving a balance in favor of the Waggoners of \$60.32. By bringing the notes into the account and giving Minter the benefit of interest, amounting to \$80.22, there is a balance in his favor of \$19.07, as the account contained on the re-

cord stands. There may possibly be an error in transcribing it, for according to our addition, we cannot make the debits against Minter amount to more than \$4533.60, embracing the entire amount, while his credits amount to \$4553.57. So much of the judgment at law as amounts to \$19.97 ought therefore to be paid with interest, and to that extent the injunction should be dissolved with damages, and perpetuated as to the residue.

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Minter seems to suppose that he is entitled to the whole \$171.39, for which he has obtained a judgment, because the note for that sum has not been brought into the account. He would be right in this, if it were not that the whole \$500 note, (for a part of which the note for \$171.39 was given) has been brought into the account. It is very clear that the Waggoners have paid the whole amount of both notes for \$500, and the interest on them, in money and property. The proof of this does not depend upon the exhibition of the notes by them as taken in and cancelled, but they shew how they were paid by their account, which Minter admits to be correct in this respect. If then the whole of the \$500 note has been paid, it is impossible that a note for \$171.39 can grow out of it and continue to exist as a just debt. It is easy to perceive how it happened that the parties have been led into the error which has been committed. When the three notes, amounting in the whole to \$481.40, were executed, the total amount of Minter's claims was \$3036.27. The Waggoners had paid before that time, \$2525.57½, thus leaving a balance due \$510.69½ instead of 481.40 as the parties supposed. The mistake was afterwards corrected by the execution of a note for \$29.24. When the three notes for the \$481.40 were given, the note for \$171.39 was not produced; and the parties acted as if no such note was in existence. That note must have been overlooked in the calculation, for upon the hypothesis that it was to be paid, there was not more than \$339.30½ due instead of \$510.69½. The Waggoners having gone on and paid the \$510.69½ with an addition of interest, and \$242 for an error, except as to the \$19.97 already mentioned, when there was only \$339.30½ due, it should be re-

If upon adjustment of accounts a mistake is made, and a wrong balance is struck by overlooking a demand on either side, the chancellor will relieve.

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garded in equity as a payment of the note for \$171,39 which was overlooked.

Decree reversed with costs, and the cause remanded for a decree in conformity to this opinion.

*Tompkins*, for appellant; *Monroe*, for appellees.

CHANCERY.

## Denham vs. Stone.

Case 48.

Error to the Madison Circuit; FRENCH, Judge.

*Usury. Assignee.*

April 10.

Judge UNDERWOOD delivered the opinion of the court.

Obligee assigns a note informing assignee that it is bearing an interest of 1 per cent. and promises that if obligor did not agree, when assignee should see him to pay the 12 per cent. interest, he (obligee) would pay it. When assignee meets obligor, he agrees to pay the 12 per cent. interest, and renews the notes including it. Decided, that as obligor had not induced assignee to purchase the note, he would be relieved from the payment of the usury.

DENHAM filed his bill to be relieved to the extent of usury included in a note given by him to Stone. Stone purchased from Curl two notes on Denham, who had promised to pay Curl an interest of 12 or 12½ per cent. per annum for indulgence. When Curl parted with the notes, he told Stone that the note then due was bearing an interest of 12½ per cent. and promised that if Denham did not agree to be responsible for an interest of that amount up to the time Stone might see him, he would. When Stone and Denham met, the latter agreed to pay the interest, and the notes were renewed including the usury. The note was renewed at another time including interest at the rate of 12 or 12½ per cent. per annum compounded. Stone now contends that Denham ought not to be relieved from the payment of the amount of usury which he had agreed to pay Curl before he parted with the notes, and the circuit court was of that opinion.

We cannot concur with the circuit court. When Curl assigned the notes to Stone, he acquired a legal right to exact payment of their amount with interest at the rate of 6 per cent. per annum, and no more. Denham's promise to pay more than that to Curl, was usurious. His subsequent agreement to pay Stone, the assignee, and consenting that it should be included in a new note, could not change the character of the promise. The notes having become

the property of Stone by the assignment would not constitute a valid consideration for a new note for a greater sum than the principal and legal interest. All above that would be usury, and before it could be recovered it would be necessary to shew that the excess above the principal and legal interest, was based upon some other valid consideration. There is no pretence for any other consideration, unless it be the promise of Curl, that if Denham would not pay or agree to be responsible for the usury which he had agreed to pay, then Curl would pay it for him. It does not appear that Denham knew of this engagement made by Curl to Stone. We do not perceive how this promise of Curl can be connected with the note of Denham, so as to constitute an additional consideration to support a new note for more than the principal and legal interest due on the old. It may be said that Stone would not have purchased the notes, but for this promise of Curl. Admit that to be true, still it cannot affect the liability of Denham, and enlarge his debt, when no act was done by him to induce Stone to buy the notes, or to give more for them in consequence of his promise to pay usurious interest. It may also be urged, that as Denham did agree to pay Stone, the assignee, the usury which he promised Curl, and actually gave his note for it, that Curl is now discharged from his promise, and Stone will loose the amount unless he can collect it from Denham. It was well understood that Denham was not legally bound to pay usury, and that his promise to pay it was absolutely void. It was a singular contract that Stone should consent to accept a void promise from Denham in discharge of Curl's engagement; and yet such is the fact from the proof in the cause: for it seems Curl was not to be bound for the usury, provided Denham agreed to pay it when he and Stone met. This rather proves that there was no valid consideration for the promise made by Curl. It certainly does not prove that Curl's promise extracted the taint of usury from the new note executed by Denham, who, for any thing that appears, remained ignorant of Curl's promise to pay, in the event Denham refused.

Correcting the error which the circuit court has fallen into, we make the amount of usury included

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in the last note, exceed \$45. The common law record, although made part of the bill, has not been copied. Our calculation might have been more satisfactory had the common law record been before us. The decree is reversed with costs, and the cause remanded for proceedings not inconsistent with this opinion.

*Caperton, for plaintiff, Turner, for defendant.*

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**CHANCERY.**

### **Sawyer vs. Oliver.**

**Case 49.**

Appeal from the Franklin Circuit; Todd, Judge.

*Lapse of time. Elder and Junior Patentees. Possession.*

**April 11.**

Chief Justice ROBERTSON delivered the opinion of the court.

Judge Nicholas did not sit.

THIS is a suit in chancery, instituted by Sawyer, a junior patentee, for land claimed by Oliver under a senior grant to Robert Church. It seems that the entry of Sawyer is valid and includes the land now in controversy. The appellee has not exhibited or relied on the entry of Church, but has pleaded and now insists on lapse of time in bar of the appellant's equity. The appellee claims 250 acres of unimproved land "*in the woods.*" Both patents had been issued more than twenty years prior to the commencement of this suit. The land in contest was never occupied under either of the conflicting titles, except so far as, by construction, it may be deemed to have been in the possession of the one or the other patentee, in consequence of an actual occupancy by residence and enclosure (under each of their claims) of other parcels of the land covered by both patents.

Robert Church, the patentee, settled within his patent boundary, about the year 1790, and continued to reside thereon until his death, since 1820; but he never extended his actual enclosure within the patent line of Sawyer. Between the years 1790 and 1792, his son, Robert Church, jr. intending with his permission to settle on a part of his tract which was

*Undisputed*," built a house near the line of Sawyer, <sup>SAWYER</sup> cleared about seven acres, covered by both patents, <sup>"</sup> and, with the assent of one Quirk, who said he <sup>OLIVER</sup> claimed under Sawyer, he cleared about thirteen acres, covered exclusively by the patent of Sawyer, and continued to reside on the place thus improved from the date of his first settlement until his death in 1825, claiming seven acres under his father, and the thirteen acres under Quirk: and there is proof, that Church, the patentee, "exercised ownership" over the whole tract included in his patent; but there is no proof of any other actual possession by him of any of the interference prior to 1813, than that which may have ensued to him in consequence of the occupancy of his son Robert.

It does not appear that Sawyer ever resided on any part of the land included by his patent, or that he had at any time within twenty years prior to the institution of this suit, any other actual possession of any part of it than such possession as many have resulted to his benefit from the occupancy of persons who entered under Quirk. It does not appear that Quirk ever settled on any part of the land covered by either of the patents—but between the years 1795 and 1798 and 1800, several persons settled within the interference of the two patents under contracts with Quirk, but all of them, except one Rutherford, entered as purchasers, by metes and bounds not including or interfering with the land now in contest. Rutherford entered as a tenant under Quirk, in 1798, and was succeeded by one Keeton, who remained until 1812 or 13.

The fact and the extent of possession must be ascertained by deductions from the foregoing circumstances. The depositions are loose and indefinite concerning facts which might have settled the controversy at once, without the necessity of resorting to inferences from the crude and imperfect generalities with which the parties, relying, we presume, on much within their own observation and knowledge, seem to have been content to submit their case. But whatever may exist out of the record, the foregoing synopsis presents all the material facts which have been proved.



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If each of the patentees should be considered as having been actually possessed of any portion of the lap, with the intention of possessing the whole, he who held the better right should be deemed to have been in the actual possession of the parcel now in contest. The appellant has the better right in equity. Church had the superior legal right. The appellant could not have maintained an ejectment on his junior legal title; he had no legal right of entry. But when he seeks his equitable right, the chancellor will apply the statute of limitations as far as such application may be consistent with equity, or, in the language of authority, "*as the statute would have applied if his right should have been legal instead of equitable.*" At law there is no difficulty in deciding, as between an elder and junior patentee (who had both been in actual possession within the lap, each claiming and intending to occupy to the extent of his patent bounds) that the holder of the elder grant had been possessed of all the land not actually enclosed by the junior patentee. But whether, if the junior patentee hold the superior equity, the chancellor should consider the possession, under the like circumstances, to have been his, is a point which this court has never directly settled. The supreme court of the U. S. decided it in the affirmative in *Hunt vs. Wickliffe*, 2d Peters.

But it does not become indispensable for this court to decide, in this case, the point thus presented, for we are of the opinion—1st. That R. Church was in possession of the seven acres, with the intention of holding, for his father, possession of the land in controversy. 2d. That the appellant never was in actual possession of the land now claimed by the appellee. (And we wish to be understood as not intimating any opinion on the point which we have waived.)

1st. We are disposed to think, that Church, the patentee, intended that the possession of his son should be extended beyond the enclosure. There is no proof that the son held any defined quantity or boundary, or occupied the land otherwise than as the beneficiary and mere locumtenens of the father: and, of course, we feel authorised to infer, that the father's actual possession

was as extensive as it would have been if he, instead of the son, had enclosed and cultivated the seven acres within the two patents; and as he claimed to the extent of his patent, we should be disposed to infer that he intended that the possession and claim should be coterminous, when not separated by intrusion; and therefore, as there is no proof restricting the possession of the son, or tending to shew the terms of his occupancy, or whether, as purchaser or as tenant, we will consider him as holding for the father, and jointly with him, without any limitation, as to quantity or boundary, by any contract between them. This inference is fortified rather than weakened by the fact that, when the son first entered, he intended to settle on "*undisputed*" land—for from this circumstance it may be inferred that no definite boundary or quantity had, by contract or otherwise, been assigned to the son, but that he was permitted to enter upon and occupy, as an usufruct, the entire tract without restriction as to boundary:—and as he retained the seven acres until his death without disturbance, we may infer that both his father and himself intended to hold land covered by the appellant's patent; and that jointly, the one as grantee, the other as usufruct, they intended to be possessed co-extensively with the grant to the father, except so far as their possession was ousted by adverse occupancy.

2d. The appellant according to the proof, was never possessed, *in fact*, of the land in contest, within twenty years prior to the commencement of this suit, unless Rutherford was possessed as lessee of all the land not included in the tracts sold to others whose possession did not intrude on the boundary now claimed by the appellee.

There is no proof of the terms of Rutherford's tenure—he seems to have been a stranger to the appellant. The depositions speak of "*his place*," and the person who now holds it as purchaser—of the eviction from it in the ejectment by Owens. These facts, combined with the fact that Owens did not touch the land now in contest, and that other persons who held defined boundaries as purchasers, from Quirk, occupied such positions as to render it im-

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probable that the lease included the land claimed by the appellee, dispose us to think that neither Rutherford nor Keeton was ever possessed in fact of any part of that land.

Besides, no privity between Quirk and the appellant has been shewn to have existed when the former sold and leased parts of the land patented to the latter:—nor does it appear that these contracts were ever recognized by the appellant:—nor is there any proof that Quirk even claimed as purchaser or otherwise, under the appellant, *the whole tract* covered by his patent or that portion of it claimed by the appellee. Therefore, there is no sufficient reason for inferring that the land now in contest was leased to Rutherford, or was claimed by Quirk, or that such claim, if ever made, was sanctioned by the appellant! It is true that one witness swore in general and incidental terms, that Quirk sold out the whole tract, and that *the whole neighborhood thereupon settled on it*—and that another witness swore that Quirk was in the possession of the whole tract. But these general allegations are evidently unauthorised deductions from *the foregoing facts*, and are materially inconsistent, in some respects, with facts proved by those two witnesses themselves. The extent of Quirk's possession and its effect on the claim of the appellant must be determined by legal deductions from established facts, and not by the hasty and unsustained inferences of witnesses whose opinions (perhaps inadvertently expressed) have not been accompanied by the reasons which may have prompted them.

Uninterrupted possession of an interference by elder patentee, and a lapse of twenty years from emanation of junior patent, is a bar to junior patentee's equitable title to the interference.

Wherefore, as Church the patentee seems to have taken possession of the land in controversy, as early as 1792, and as there is no sufficient proof that his possession has ever been interrupted by any intrusion, actual or constructive, the appellee is protected by lapse of time to the whole extent of the 250 acres claimed in this suit.

Decree affirmed.

Triplett, for appellant; Huggin, for appellee.

**Patsey Stewart vs. S. D. B. Stewart, CHANCERY.**  
*alias Towns.*

Error to the Christian Circuit; SHACKLEFORD, Judge. Case 50.

*Contract, unreasonable. Cancellation of Contracts.*

Judge UNDERWOOD delivered the opinion of the court. April 11.  
 Judge NICHOLAS did not sit.

IN December, 1823, Stephen Stewart published his last will, by which he gave to his wife, the plaintiff in error, one-third of his personal estate during her life or widowhood, and upon her death or marriage, the one-half of said third was to be subject to her disposal absolutely, and the other half was to go to his two daughters. He likewise devised to his wife during life, or widowhood, several tracts of land with the same provision upon her death or marriage, leaving half at the absolute disposal of the wife, and the other half to the daughters. The will gives fifty acres of land to Lucy Towns, Stephen D. B. Towns, (alias Stewart) the defendant in error, and Betsey M Farland.

In 1826 the testator died. It appears from the record that he lived for many years with the woman called by the name of Lucy Towns, and that the defendant in error was the issue of their cohabitation. In the fall preceding the making of the will the testator left home with the plaintiff in error, and they were married by a justice of the peace of Butler county, according to the forms of law. Before this event, but how long does not appear, he had separated from Lucy Towns, and in consequence thereof a quarrel took place between him and the defendant, who took sides with his mother. It is proven that Lucy Towns said she never was married to Stephen Stewart. This circumstance connected with the provisions of the will, and the fact that he married the plaintiff leave but little doubt that the connection between the testator and Lucy Towns was illicit.

On the day before the testator's death, the defendant visited him. He returned the next day and found the testator dead. Before the corpse was interred the transaction took place which constitutes

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the subject of the present suit. The plaintiff executed an instrument of writing purporting for the consideration of one dollar, to sell or convey to the defendant all her right, title, interest and claim to the estate of Stephen Stewart, deceased, which she then was or might thereafter be entitled to by deed of gift, will, or in any manner whatever. On the same day this instrument was executed, the defendant executed another binding himself for the consideration of one dollar, to deliver over to the plaintiff two beds and furniture that she brought with her when she came to live with Stephen Stewart, his father; also one large kettle, one small pot, and one stew pan, and also her wearing apparel; all of which articles, according to the stipulation of the writing, he was to deliver as soon as possible, giving time for an executor or administrator to act lawfully.

The plaintiff filed her bill in substance alledging that the instrument executed by her was signed and delivered without any sufficient consideration, at a time when she was ignorant of her rights under the will, when she was not qualified to transact business, through grief for the loss of her husband, and when she was under the influence of fear excited by the conduct and threats of the defendant, wherefore she prays that the instrument may be cancelled.

The answer of the defendant admits nothing favorable to the plaintiff. He insists that the contract was fair, and ought not to be disturbed. The court dismissed the bill with costs.

The transactions presented by the witnesses are of rare occurrence. The idea of the wife and the son deliberately and calmly bargaining over the dead body of the husband and father, before it has been committed to the grave, and disposing of the estate left by him, is incompatible with those feelings of our nature, generally, if not universally, excited by the presence of the corpse. A stranger upon such an occasion would be regarded as destitute of common sympathy who would make the mansion of the unburied dead the place of traffic. How the nearest connexions and relations of the deceased can do it is unaccountable upon the ordinary principles and feelings which govern human conduct.

During the existence of coverture the law denies to the wife the capacity to contract, except in a few cases of peculiar character. The death of the husband removes the legal disability. The sorrow which pervades the mind and heart of a wife in consequence of the death of her husband, for whom during the coverture she felt common respect and affection, does, in many cases, temporarily disqualify and unfit the mind for a deliberate survey of the new attitude in which she is placed, and the new rights and duties which devolve upon her. Without saying, that all contracts made with a widow between the death and burial of her husband, would be regarded by us as void, *prima facie*, in consequence of the general prevalence of grief during this period, and a correspondent disqualification to think of and attend to business, it may be safely affirmed, that all such contracts should be watched with a jealous eye, and whenever there exists the least circumstance of unfairness or circumvention, the chancellor should interfere and set them aside.

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In this case it is proved, that the plaintiff evinced by her conduct a deep sense of her loss. She manifested her affection by kissing the corpse, and she wept. There is nothing in the record which will authorize us to pronounce these indications of heart-felt sorrow, the artifices of deceit.

According to the proof, the defendant and his mother were at the mansion-house before the testator was buried, setting up pretences of authority, to say the least of it, in defiance of the rights of the lawful wife. He demanded the keys of R. Lewis, the plaintiff's brother, and said he would go where he pleased, keys or no keys. The plaintiff, at the request of George Myers, surrendered the keys to the defendant, who gave them to M'Lean and M'Kinny to keep, and to examine the drawers. &c. for papers and money, which was done. The defendant became angry. He held an open French dirk in his hand. The plaintiff and another lady endeavored to get it from him. He refused to give it up to them—expressed a willingness to surrender it to some of the "boys," and said, he did not intend any harm; and if he wanted to hurt any one, he would

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rather do it with his fist. The defendant, by a question asked a witness, attempts to shew that he did not design to alarm by holding his open dirk in his hand; and that he took it out in order to hold up the bolt of one of the locks that was out of repair. Admitting that he first produced the knife for that purpose, it is incredible to believe that the two women should have desired to get the knife from him, and that the plaintiff should have been alarmed at it, as the witness says she was. if he had immediately, after fixing the bolt, put up his knife. What cause of quarrel or dispute there was between Lewis and the defendant, we are not told, nor does the record exhibit any thing at which he could in our opinion be justly offended. By one witness it is proved that the plaintiff, when the defendant came, shut the doors in apparent alarm, and refused admittance. We refrain from stating facts detailed by witnesses whose credibility has been assailed. The inference to be drawn from the foregoing, we think, well justifies the opinion that the plaintiff was induced to enter into the contract mainly by the improper and violent conduct of the defendant, and not from a deliberate conviction, even if she had been in a situation to mature the subject, that the contract was beneficial to her.

According to the defendant's own admission, he had fallen out with his father because he discarded his mother and married or lived with the plaintiff as his concubine; to state it as the defendant would have it considered. This of itself was well calculated to make the plaintiff look upon him with distrust. If he had been a legitimate son, discarded as he seems to have been, he had no right after his father's death, leaving such a will as he did, to enter upon the mansion-house premises and demand the keys. His object in the whole proceeding was manifest. It was to divest the plaintiff of her rights, or to prevent her from sacrificing the rights of others. If this last he insisted on as the cause of his interference, it may be truly replied that the law did not constitute him the guardian of any person's rights in this case. It was his improper conduct, it seems, which induced many to advise the plaintiff

to take what she brought and give up the rest. Such advice, under such circumstances, was well calculated to add to the weight of the plaintiff's grief, and further to distract her mind.

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tices.)

It does not appear that the plaintiff at the time she executed the writing conveying her interest in the estate of her deceased husband, had any knowledge of the contents of the will. She alleges she had not. The defendant expressed his disbelief of the allegation, but does not pretend that the will was exhibited, or its contents made known at the time the contract was made. We think it but a just inference, from the fact of his getting possession of the keys, examining drawers, &c. that he discovered the will and learned its contents. If so, he ought to have made it known to the plaintiff before contracting with her.

The consideration of the contract is trifling, if it can be regarded at all. It proposes to secure to the plaintiff (regarding one obligation as the consideration of the other) a very inconsiderable portion of the property devised to her, and for that little, she gives up the balance worth ten or twenty times as much. It is manifest that unless the estate is insolvent, or nearly so, the consideration received by the plaintiff amounts to nothing.

Upon the whole case, we are clearly of opinion, that the contract comes within that class which Powell, in his treatise denominates *unreasonable*, and is as fit a case for the interposition of the chancellor as the case of *Herne vs. Meeres*, reported in 1. Vern. 465, and *Brown's Chan. Ca.* 176 in note, and commented upon by Powell on Contracts 153.

The decree of the circuit court is therefore reversed with costs, and the cause remanded with directions to enter a decree cancelling the contract between the parties.

*Crittenden*, for plaintiff; *Brown*, for defendant.

Contract made with a widow immediately after death of her husband, while his body lay an unburied corpse in her presence, and under circumstances of violence calculated to intimidate her to its execution, and by which, for a small consideration, she relinquishes a considerable legacy to which she was entitled by her husband's will, decided to be *unreasonable*, and therefore cancellable by the chancellor.



ASSUMPSIT.

**Saffran's Admr's. vs. Kennedy.**

Case 51.

Error to the Christian Circuit; SHACKLEFORD, Judge.

*Assets. Administrator de bonis non.*

April 12.

Chief Justice ROBERTSON, delivered the opinion of the Court.  
Judge Nicholas did not sit.

In an action of assumpsit, Kennedy obtained a judgment against the administrators *de bonis non* of John Saffrans, deceased—to reverse which, this writ of error is prosecuted.

Various errors are assigned; but being of opinion, that there is no error in the pleadings or in the opinions of the circuit court thereon; this court will consider the assignment of errors only, so far as it complains of error after the issues were concluded.

On the trial, upon an issue upon a plea of no assets and upon other issues, the defendant in error was permitted to read to the jury, a document purporting to be a receipt given by the plaintiffs in error to the clerk of the county court for bonds described as obligations which had been given to the same man who was administrator, for slaves sold by him as a commissioner, and which had been deposited with the county court after a settlement with the representative of the administrator, prior to the appointment of the administrator *de bonis non*. The plaintiffs in error excepted to the admission of that document as evidence; and we are of opinion, that the circuit court erred in admitting it.

Bonds executed to the administrator in his fiducial character, could not have constituted assets in the hands of the administrator *de bonis non*, because the assets for which they had been given had been specifically and essentially changed, so that the bonds should have been deemed chattles belonging to the obligee, and not assets in the hands of the administrator. The personal representative of the deceased administrator could alone maintain suits on the bonds—(See Ba. Ab. Tit. Exr's.) *A fortiori*, bonds made payable to commissioners in consideration of a sale of slaves (in the hands of an administrator) cannot be assets in the hands of an administrator.

trator *de bonis non*. The slaves were, we presume, sold for the benefit of the distributees, and because a division in kind was impracticable. The commissioner was a trustee for the distributees—and the bonds given to him were not assets in his own hands, as the administrator; consequently they cannot constitute assets in the hands of the plaintiffs, as administrators *de bonis non*, who, as such, would have a right to nothing which had not remained actually or *virtually* in specie, as it was left by the intestate, and had not been administered by the administrator. And to that effect the plaintiffs moved the circuit court to instruct the jury—but the instruction was refused.

SAFFRAN'S  
ADM'RS.  
VS.  
KENNEDY.  
— — — — —  
Nothing is as-  
sets in the  
hands of an  
adminis- rator  
*de bonis non*,  
except those  
things which  
remain in spe-  
cie, as left by  
the intestate,  
and which  
have not been  
administered  
by the admin-  
istrator.

In admitting the document A from the county court, and in refusing to give the foregoing instruction, the circuit court erred.

But there was no error (as the plaintiffs seem to suppose) in the refusal by the circuit court to instruct the jury that the amount ascertained, on settlement with the county court, *to have been due by the administrator*, and not accounted for by him, was the proper criterion for determining the amount of assets which had come to *their* hands. That balance could not have been assets in the hands of the administrators *de bonis non*. But whatever chattles of the intestate remained unadministered by the administrators, may have been assets in their hands.

Amount, as-  
certained, on  
settlement  
with the  
county court,  
*to have been  
due by the ad-  
ministrator*,  
is not assets in  
the hands of  
the adminis-  
trator *de bo-  
nis non*, and  
therefore is no  
criterion for  
determining  
the amount of  
assets which  
have come to  
the hands of  
the adminis-  
trator *de bo-  
nis non*.

But for the errors which have been suggested in this opinion, the judgment of the circuit court must be reversed and the cause remanded for a new trial.

*Brown*, for plaintiffs; *Morehead*, for defendant.

DEBT.

# Branham et al. vs. Commonwealth, for use of Adair.

C 15. 52.

Error to the Bourbon Circuit; FRENCH, Judge.

*Assets. Administrator. Lawyer's Fee.*

April 12. Chief Justice ROBERTSON delivered the Opinion of the Court.  
Judge Nicholas did not sit.

In an action against an administrator for *devastavit* in the foundation of the creditor's claim be a contract

made previous to the 1st of March, 1822, the administrator will be held liable for property sold by him as assets, notwithstanding it was such property as was exempt from execution

This writ of error is prosecuted to reverse a judgment obtained by Wm. Adair, as relator, against Wm. W. Branham, administrator of W. Sanford, and against Wm. B. Branham, his surety in his official bond, in an action of debt, suggesting a *devastavit*.

On the trial upon several issues, the circuit court instructed the jury, that the administrator was liable to the relator for sundry articles appraised and sold as assets, but which the plaintiffs in error seemed to suppose to be the property of the widow and children of the intestate, in virtue of the 1st sec. of an act of 1821. (1st Digt. 1538). This instruction was proper, because it appears that a contract made, prior to the enactment of that statute, was the foundation of the relator's judgment. (See the 2d sec. of the same act.)

But the circuit court erred in instructing the jury that the administrator was not entitled to a credit for \$20 for keeping a mare and colt—\$15 paid by him for keeping a colt, and \$10 paid by him to a lawyer, as a fee for appearing for him on a trial of the right of property claimed by another in the mare and colts; and all of which sums had been allowed as credits in his settlement with the county court.

The mare (for keeping which the allowance had been made) and another mare had been posted as strays by a freeholder, but for the benefit, as is alleged, of the intestate Sanford. When these mares came to the possession of the administrator, two years had not elapsed from the time of the posting. The administrator had, therefore, no legal right to sell them; nor could he ever have had a right to sell them as assets, without the assent of another, because, if the owners did not apply for them within two years, the law vested the title in the person who

posted them. But executions against the administrator were levied on one of the mares, and on the colts of both of them as assets in his hands, and they were sold to satisfy those executions, in consequence of the verdict of a jury empannelled to try the right of property, asserted against the administrator by the person who posted the dams. It was for the services of a lawyer in his behalf on that trial, that the administrator had been allowed a credit for \$10, which he paid as a fee. The horses should not be deemed to have been assets before they were subjected by the verdict to sale.

Now it seems but just and reasonable that, as there is no proof shewing that the administrator had a right to sell the horses sooner or otherwise than they were sold, and as they were eventually appropriated to the extinguishment of judgments against his intestate, he should be allowed a reasonable compensation for keeping the mare and colt which he kept and sustained with his own means, and should also be allowed what he had paid for the keeping of the colt which he employed another person to keep for him. And it appears to be equally just that he should have a credit for a reasonable fee paid to the lawyer for successfully vindicating his claim to the strays, whereby debts equal in dignity to that of the relator, had been partly or entirely extinguished. The fee thus paid should be deemed so much money expended necessarily in the course of administration. The settlement with the county court is *prima facie* evidence of the reasonableness of the credits allowed by that tribunal; and there is no fact in this record tending to counteract or impair the legal operation and effect of that settlement.

Wherefore, the circuit court erred in instructing the jury to disregard the allowances which had been made for the attorney's fee, and for the keeping of the horses.

Judgment reversed, and cause remanded for a new trial.

G. Davis, for plaintiffs; Cunningham, for defendant.

BRANHAM ET  
AL.  
V.  
COMMONW'H.  
FOR USE OF  
A JURY.

A fee paid by an administrator to a lawyer for defending the title of the administrator as such, to property, will be deemed money necessarily expended in the course of administration, and the administrator allowed credit for it.

## COVENANT.

## Stockton vs. Turner.

Case 53.

Error to the Clarke Circuit; FRENCH, Judge.

*Bonds. Conditions. Injunction Bond. Estoppel.*

April 12.

Chief Justice ROBERTSON delivered the Opinion of the Court.  
Judge NICHOLAS did not sit.

THIS writ of error is prosecuted to reverse a judgment, by Turner, for the use of Trip-let, against Stockton, in an action of covenant on an injunction bond, executed by Cox, as principal, and the said Stockton as surety.

A nonsensical or repugnant condition will not affect an obligation, even though the entire condition be incongruous or uncertain: *a fortiori*, an uncertain or repugnant stipulation or expression in a condition which is consistent and certain in other respects will not change the import of the contract. If the condition of a bond be that, "if the obligor do not pay, the bond shall be void," the obligation will be understood to be single, or as if there had been no condition; for when the condition recites a debt, and after lays an obligation not to pay it, to import that, if the obligor shall pay the £7 the

The first objection made in this court to the judgment is, that the circuit court erred in overruling a demurrer to the declaration. The only objection that has been or can be made, with any semblance of plausibility, to the declaration, is that, in the condition of the bond the stipulation is *literally*, that if the obligors "or either of them shall well and truly pay the debt aforesaid, to the said Peter Cox," &c. The insertion of the name of Cox instead of that of Turner, is a palpable mistake of such a character as not to affect the obligation: it is a mistake which the obligation itself, without the condition, and even the whole tenor and legal effect of the condition, without regard to the obligation, will correct. A nonsensical or repugnant condition will not affect an obligation, even though the entire condition be incongruous or uncertain:—*a fortiori*, an uncertain or repugnant stipulation, or expression in a condition, consistent and certain in other respects, cannot change or materially affect the import and effect of the contract. Thus, if the condition of a bond be that if the obligor do not pay, the bond shall be void, the obligation will be understood to be single, or as if there had been no condition—"for when the condition recites a debt, and after lays an obligation not to pay it, it is in that repugnant and void."—*Ba. Ab Cond. L & Cooke vs. Graham's administrators*, 3d Cranch. So if the condition of a bond to pay £7 by 2s. per week, till £7 are paid be that, if the obligor fail to pay the 2s. at any of the days when they should be paid, the obligation shall be void—the condition shall be taken distributively; and

obligation shall be void, but that if he fail to pay the 2s. at any of the days prescribed, it shall be in full force.—*Vernon vs. Alsop*, Lev. 77.

STOCKTON  
vs.  
TURNER.

Wherefore, the bond in this case must be construed as a valid obligation to Turner, as described in the declaration; and as, in other respects, it is described according to its legal effect, the declaration is good.

it is in that  
repugnant  
and void

But the next objection to the judgment is more formidable. The bond stipulates for the payment of a judgment for \$280.50, and describes the judgment as one for that sum. But on a writ of enquiry the circuit court permitted the plaintiff in the action to read to the jury a judgment for \$288.50, and instructed the jury that the latter sum with legal interest, from the date of the judgment should be included in the assessment of damages. That instruction cannot be sustained.

Stockton's liability cannot be extended beyond the amount which by the bond, he undertook to pay. The parties are estopped by the bond to deny that there was such a judgment as that which the bond describes, or to shew any other judgment than that thus described. If the judgment read on the writ of enquiry had corresponded with that described in the bond, it would have been admissible evidence for no other purpose than to shew (if it would shew such fact) when the interest, mentioned in the bond, commenced running. The judgment which was read was for damages, without any interest; and therefore, as the bond itself, without the exhibition of a judgment, bearing interest, (as described in it) furnished the only legal evidence of the extent of Stockton's liability, and does not shew how much interest should be charged as having accrued on the judgment described, no interest prior to the date of the bond, should be included in the assessment of the damages. The \$280.50, and the costs of the common law suit, therefore constituted, according to the only legitimate evidence in this record, the amount which was actually enjoined. The bond does not shew the date of the judgment; and

In an action on injunction bond, decided that the parties are estopped by the bond, to deny that there is such a judgment as that which the bond describes, or to shew any other judgment than that thus described.

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vs.  
BAKER.

no other judgment than that described in the bond would be evidence.

Therefore, without any other proof than that contained in the record, the jury should have been restricted in their assessment of damages, to \$280.50, and the costs of the common law suit, together with legal interest on that aggregate sum, from the time when it was first actually enjoined, and also the costs of the chancery suit. No proof would be admissible to contradict or enlarge the injunction bond.

Wherefore the judgment of the circuit court must be reversed, and the cause remanded for a new trial.

*Morehead, Haggin, and Crittenden, for plaintiff; Triplett, for defendant.*

TROVER.

## Clarke vs. Baker.

Case 54.

Error to the Mercer Circuit; KELLY, Judge.

*Limitation. Statute of. Possession. Slaves. Instructions. Reception. Continual Claim.*

April 12.

Judge NICHOLAS delivered the opinion of the Court.  
Chief Justice Robertson did not sit.

THIS was an action instituted in 1825, by Clarke against Baker, for the Trover and conversion of slaves. On the trial of the general issue the plaintiff proved that in 1818 the slaves were sold, conveyed, and delivered to him by Martin Baker; that he had held possession of them from that time till 1825, when they secretly left him, or were carried off in the night, and a few days afterwards were found in the possession of the defendant, who refused to deliver them up. The defendant then shewed that Martin Baker, in 1817, by an answer in the nature of a cross bill against Clark and others, in a suit then pending in the Garrard circuit court, prayed and sought a rescission of the contract of sale of said slaves, and to have them redelivered because of alleged fraud and imposition on the part of Clarke, in their obtention; that Martin Baker died in 1823;

7m194  
q115 881  
115 882

that said bill was regularly continued until 1826, **CLARKE**  
 when it was revived in the name of the defendant,  
 as administrator of said Martin, and that it was now **VS.**  
 pending; that the defendant had administered on the **BAKER.**  
 estate of said Martin. He also introduced witnesses  
 whose testimony conduced to shew, that at the time of  
 making the sale to Clarke, Martin Baker was of un-  
 sound mind, and that plaintiff had taken advantage  
 of his weakness, to procure a sale of the slaves at an  
 inadequate price. Upon this testimony the plaintiff  
 moved the court to instruct the Jury:—

“1st. That a party remaining in the adverse possession of slaves for five years, thereby becomes invested, in virtue of the statute of limitations, with such a right as to enable him to recover them of the former owner, who may afterwards have obtained the possession wrongfully.

2d. That the pendency of a suit in chancery between the same parties, about the same slaves, will not protect such former owner *wrongly* obtaining the possession against the operation of the statute of limitations, in action at law, brought by the party from whom they are taken or withheld.

3d. That a party, who, during the pendency of a suit brought by him to recover the possession of slaves, takes said slaves from the possession of his adversary, without his consent, is a wrong doer.”

The court refused to give either of these instructions, and for so refusing, assigned for reasons to the counsel and jury, that, “as Martin Baker had by his bill asserted title to the slaves before they had been five years in the possession of plaintiff, the case was not within the reasons of any opinion of the appellate court, in the cases to which the court had been referred, the possession of the plaintiff Clarke having been disturbed by the suit in chancery.” For refusing to give said instructions the plaintiff excepted. Verdict and judgment were rendered for the defendant. The plaintiff then moved the court for a new trial, because the verdict was contrary to law and evidence, and because the court erred in its instructions to the jury. The court overruled the motion for a new trial, and



CLARKE  
vs.  
BAKER.

Clarke has appealed to this court, and assigns for error the refusal to give the instructions asked, and the overruling his motion for a new trial.

Before entering upon an investigation of the errors assigned in behalf of Clarke, we are met by a preliminary objection on the part of the defendant, Baker. It is this: In addition to the plea of not guilty, Baker filed another plea, in which, after setting forth the filing of Martin Baker's cross bill, its pendency and subsequent revivor in his name, as his administrator; he says "that said Martin had good title to said slaves, and defendant as his administrator, in which character he holds them, has a right to the possession and disposition thereof, and further avers, that the suit in chancery is still pending, &c." To this plea the plaintiff demurred, and the court sustained his demurrer. It is now insisted that this plea is good—presents a substantial bar to the action, and that the court, judging upon the whole record, must render a judgment of affirmance without regard to any errors which may have intervened to the prejudice of Clarke. The plea could scarcely have been drafted with a view to present the issue which it is now contended to embrace; nor does it contain a sufficiency of either form or substance to subserve the purpose to which it is attempted to apply it. Waiving all exception to the loose and unusual dress in which it is supposed to assert proprietorship of the slaves in Martin Baker or the defendant, it does not aver when Martin had "good title," how long it subsisted, nor that he retained it at the time of his death, and though it asserts that the defendant has the right to their possession and disposition, it does not affirm that he had such right at the institution of the suit. A state of case may well be imagined which would allow all the allegations of the plea to be true, and still leave a right of action in the plaintiff. As suppose a mortgage from Martin to the plaintiff; a seizure and conversion of the slaves by the defendant, and after institution of the suit a payment of the mortgage by the defendant. This reinvestiture of the title in the defendant, after suit brought, would not destroy the plaintiff's right of action, existing at the time of its institution. This

construction of the plea may be deemed critically severe and exact. Be it so. Every plea which is attempted to be used for a similar purpose, should be made to undergo a similar test. Besides, we think there was great force in the objection urged at the bar, that the plea, if good at all, amounts only to the general issue, and therefore should receive no further consideration than if it were a second plea of not guilty, which the plaintiff had failed to notice. Having disposed of this objection, we shall proceed to consider the questions presented by the assignment of errors.

CLARK  
vs.  
BANKER.

The first is whether the court should have given the instructions as asked by the plaintiff.

The propriety of giving the third instruction asked for was waived in argument, and the two first only insisted on. To those two on the one hand it is objected, that they were merely abstract propositions of law, not applied to, nor comprehending all the facts or aspects of the case, whilst, on the other, it is contended that they embrace legal points applicable and pertinent to the facts and issue, and that if they needed qualification, the qualification should have been made by the court, or by instructions which should have been asked by the adverse party. It has long been settled, that the court may instruct the jury without being moved so to do, but it is not bound to do it. It need only decide upon the instructions as asked, and is under no obligation to mould them into proper form. The general rule is that the court should not give instructions on mere abstract points of law. In determining what is or is not an abstract proposition the cases savour no little of an undue degree of nicety. It would seem that every proposition is deemed abstract, however pertinent or applicable it may be, unless it be made to apply in express terms, either to the attitude of the parties or the very facts in issue. See *Hamilton vs. Russell*, 1. Cranch, 309—*Metcalf vs. Cowen*, Litt. Select Cas. 320. Tested by this rule alone, the instructions were properly refused. They are obnoxious to a still stronger objection. They do not embrace all the aspects of the proof. They are not

The court may instruct the jury without being moved so to do, but it is not bound to instruct unless requested so to do.

When instructions to the jury are requested of the court, it is bound to decide upon them in the form in which they are draughted and presented to the court, but it is not bound to mould them into the proper form.

General rule is that the court should not give instructions on mere abstract points of law.

CLARKE  
vs.  
BAKER.

AN instruction, however pertinent or applicable it may be, is abstract unless it be made to apply, in express terms, either to the attitude of the parties, or the very facts in issue.

hypothecated on the condition that the jury should disbelieve the proof as to Martin Baker being of unsound mind. Without such a reservation they were calculated to mislead the jury into the belief, that five years adverse possession would vest the title in the plaintiff, whether he was of unsound mind or not.—*Bowman vs. Bartlett*, 3 Mar. 97.

The next question is, did the court err in refusing to grant a new trial? This mainly depends upon another. Did it misdirect the jury?

It is contended in the first place that the record does not shew any instruction to the jury such as is complained of, that there was no instruction given. There is no fair ground for this position. The bill of exception states, that the court, in giving its reasons to the jury, for refusing the instructions asked by plaintiff, told them, that the possession of Clarke was *disturbed* by the suit in chancery. This, though not in terms, a declaration that the suit in chancery suspended the operation of the statute of limitations; yet, when taken in connection with the circumstances, was tantamount thereto, and equally well calculated to impress the jury with the idea that it did. How could the jury understand that Clarke's possession was disturbed, unless it was changed from its adverse character into an amicable possession, or that it stopped the statute from running in its favor? We must consider the court as having so instructed, and test the case accordingly.

It is urged that conceding this point, the instruction was still proper. That the statute of limitations takes away no right, but only bars the remedy. That it only confers the right of property on an adverse possession, where the remedy is gone. That the pendency of the chancery suit preserved the remedy in full life, and with it the right. That whilst the right remained, the right of recaption continued. That during the continuance of the right the statute barred an action, but did not inhibit a self redress by recaption; that in analogy to the continual claim to land, the chancery suit was a continual claim which saved the right against the running of the statute. It must be conceded, that this

argument, however novel it may be, is plausible and most ingenious. We can accord to it no further merit. Its fallacy principally consists in assimilating the operation of the chancery suit, to that of continued claim, to which it bears no perfect resemblance, and the confounding of an obvious distinction between the preservation of the remedy in the very suit, for the mere purposes of that suit, and the preservation of the remedy generally.

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vs.  
BAKER.

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Uninterrupted adverse possession for five years carries with it so strongly the idea of a matured right, that the circuit court, in conveying its opinion to the jury as to the effect of the pendency of the chancery suit, said that it *disturbed* Clarke's possession. This was not contended for in argument here, but it was merely insisted that it preserved the remedy. Now, continued claim does actually disturb the possession; it severs its continuity and breaks it into disunited links. Continued claim preserved the right of entry, by making an attempt to enter, which the common law construed into an actual entry, from the high estimation in which it held the realty, and its disposition to preserve a right to it. It was also a species of remedy, a sort of self redress that kept the right alive, but like other remedies, it kept it alive only for the purpose of effectuation by its own means; and if not carried out to final fruition it served no purpose, and did not change the relative attitude of the parties. The law not holding the personalty in the same estimation, allowed no continued claim to a chattel, nor does it authorize any proceeding analogous to it. But suppose it did—a suit for a chattel would then, only bear the same analogy to continued claim to it, that a suit for land would bear to continued claim for the land. Would then a suit for land brought before the lapse of twenty years, and still ending after it, preserve the remedy or the right? It has been determined that it would not. Former decisions of this court have settled, that, even where there has been a judgment of eviction in favor of the plaintiff, and he fails to obtain possession under it before the expiration of the time, his right of entry is not saved. This was admitted in argument, and it was conceded, that

CLARK  
vs.  
BAKER.

the pendency of ejectment for land, would not preserve the remedy in the manner contended for in the case of a chattle. It was insisted that there was not a perfect analogy between the two class of cases, because the law did not allow a recaption of land. This is true in the letter but not in substance. It allows a peaceable retaking of the possession of land, which as a self-redress is entirely similar to the right of recaption as to chattles. It is also insisted that the analogy between the cases fails, because as to land there is a higher remedy given. Let us test this distinction. Suppose a writ of right brought before twenty years adverse possession, and still pending after the lapse of thirty years, could the demandant, by a peaceable entry after thirty years, defeat the operation of the statute in maturing adverse possession of the tenant into an absolute right? Would the mere pendency of the suit cause his entry to have relation back to the time of the institution of the suit and reinvest him with the right of property as he then had it, and which otherwise would have become extinct? We presume this would not be contended for by any one. If so, it is difficult to discern any want of analogy between the two class of cases. The same law must govern both.

Five years  
adverse uni-  
terrupted pos-  
session of  
slaves invest  
the possessor  
with so per-  
fect a title,  
that he can  
recover them  
from the for-  
mer owner  
who may  
have obtained  
possession of  
them wrong-  
fully.

Suppose A sues B for a slave before the lapse of five years, and after the five years brings another suit for the same slave, the first still pending, that B waives his plea, in abatement, and pleads the statute of limitations, A could not avoid it by replying the pendency of the former suit. Is not this because the institution and continuing pendency of the former suit does not preserve the remedy except for the purposes of the very suit?

Let us test this novel invention, by a practical application of its principles. Let us apply them to the facts in this cause. Martin Baker died in 1828; the chancery suit was not revived till 1826. Where was this right of recaption from the time of his death till that of reviving the suit? Was it *in nubibus*, or was it slumbering with the suit on the chancery docket? After his death, the suit was defunct also, and if the process of revivor had not been applied

to it, would have remained so, till the "crack of CLARKE  
doom." It was itself in a state of exanimate torpor;  
it was utterly incapable of communicating vitality <sup>VS.</sup>  
to any thing else; yet its actual pendency, according <sup>BAKER.</sup>  
to the argument, is the very life principle to this as-  
sumed right of recaption. The recaption took  
place, and this suit was brought in 1825, many  
months before the revivor. According to the rea-  
soning which bases the right of recaption on the  
pendency of that suit, the right did not exist at the  
institution of this suit. Clarke's right to recover,  
then, by force of his adversary possession was abso-  
lute at the institution of his suit. Could this right  
be divested; could it be utterly abrogated by the  
subsequent revivor? It cannot be seriously so con-  
tended. What then, must we permit Clarke to pro-  
gress to final judgment in this suit, upon his perfect  
right, as it existed at the commencement, and then  
permit to Baker to turn round, sue, and recover  
from him, upon a principle of *post limini* operating  
upon the revivor of the chancery suit? We cannot  
be led into the entanglement of such absurdity.

Why make this interpolation on the statute of  
limitations? Is it for the preservation of any essen-  
tial right, not falling within its mischief? Not so.  
If the chancery suit ever was, or could be made  
effectual, Baker's road to redress is still open and  
plain. He does not necessarily require the aid of  
this new invention. Or, are we to do this for the  
wise purpose of encouraging a litigant to scramble  
for the possession of property, after he has brought  
suit for it, and placed it as it were in the custody of  
the law.

The statute of limitations is viewed by all jurists  
as one of the wisest enactments of our code: we shall  
not easily be induced to countenance any new device  
for its evasion.

Statute of  
limitations is  
one of the  
wisest enact-  
ments of our  
code.

We forbear to prolong the discussion. We may  
be liable to the censure of having dwelt more upon  
it than the intrinsic merit or difficulty of the point  
would seem to deserve. Our apology must be found  
in the great zeal and apparent confidence with which

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vs.  
MAULDING.

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it has been urged upon us, and the talents and high professional standing of those who urged it.

Wherefore, the judgment is reversed, and the cause remanded, with directions to set aside the verdict, grant a new trial, and for further proceedings consistent with this opinion. The appellants must recover their costs.

*Haggin, Talbot, and Wickliffe, for plaintiff; Crittenden and Brown, for defendant.*

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DETINUE.

## Pyle vs. Maulding.

Case 55.

Appeal from the Todd Circuit; BRODNAX, Judge.

*Slaves. Deed of gift Deeds recording of. Witness. Calendar Months.*

April 13.

Chief Justice ROBERTSON, delivered the opinion of the Court.

THIS appeal is prosecuted to reverse a judgment in detinue, by Francis Fernetta Maulding, against Thomas Pyle, for two slaves, and for \$145.62½ damages for the detention of them.

The appellee claimed the slaves under an instrument of writing purporting to be a deed of gift from Charlotte Adams, dated the 26th or 27th of September, 1819, and which reserved to the donor the possession for five years succeeding its date.

The appellant derives his claim from a purchase of the slaves by him the 13th of June, 1826, under a fieri facias which had been issued in his favor against William Pyle and Charlotte his wife, formerly Charlotte Adams, the donor.

It does not appear that there had ever been an actual delivery of the slaves to the appellee, or that she had ever been possessed of them except so far as the possession of the donor after the acknowledgment of the deed might be deemed the possession of the donee. On the 27th of June, 1820, the deed was proved by one subscribing witness in the county in which the parties resided, and in July, 1820, it

was proved by another subscribing witness, and was **PYLE** actually recorded either when first proved, or when last proved, but at which of the times the proof does **MAULDING.** not distinctly shew.

The appellant assailed the deed, because—1st. It was procured, as he alledged, by duress. 2d. Possession was never delivered to the appellee. But the circuit court instructed the jury, that an actual delivery of the slaves was not necessary for vesting the legal right in the donee, if the donor “executed” the deed, and if it had been recorded in the county in which the parties, or one of them lived.

The appellee having proved on the trial that both the appellant and William Pyle (the husband of the donor) had made declarations tending strongly to shew that the appellant was not in fact a creditor, but that his judgment was merely colorable, and that he bought the slaves for William Pyle, and that this suit is for William’s benefit, the circuit court decided that Mrs. Pyle, the donor, was not a competent witness for the appellant, and refused to permit him to have her sworn either in chief, or on her *voir dire*.

After verdict, the circuit court overruled a motion for a new trial, made on the ground that the court had erred in the progress of the trial, and that the verdict was contrary to the law and evidence of the case.

As the circuit judge had a right to infer from the evidence that the husband was interested in the event of the suit, and was in fact the beneficial party, the examination of the wife on her *voir dire* would have been useless. If the appellant himself had admitted on the trial that her husband was interested directly in the event of the suit, nothing that she could have said on examination as to her interest, could have rendered her competent. We are therefore of opinion, that there was no error in refusing to permit her to be sworn, because there was sufficient proof that the appellant had admitted that her husband was interested.

When the husband is the beneficial, though not the nominal, plaintiff in a suit, his wife is an incompetent witness.

But, consider the appellant, not as a *bona fide* creditor or purchaser, but merely as the friend and



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agent of William Pyle, in which attitude the jury had a right, from the proof, to place him, we are nevertheless of opinion, that he was entitled to a new trial—1st, because the circuit court erred in its instruction to the jury, and 2d, because the verdict is contrary to both the law and the fact.

1st. If the deed be, as it purports to be, a Gift, a delivery, in form or fact, of the slaves was not essential to the right of the donee, if the deed had been proved or acknowledged *and recorded* within eight months from the day of its date. A good consideration is expressed in the deed, and seems in fact to have resulted from the relation in which the parties stood to each other. Without actual delivery, a parol gift would have been ineffectual; but a deed of gift, when delivered, *per se* transfers the possession with the property, and when *duly* recorded, vests a perfect and irrevocable legal right in the donee. This doctrine is too familiar to need citations of cases in support of it.

But as between donor and donee of a slave, the title does not pass, unless actual possession of the slave shall have been delivered, or unless the deed shall have been actually recorded according to the requisitions of the law prescribed for such cases. The deed itself does not transfer either the possession or the right, (in such case) unless it shall be duly recorded. The 41st sec. of an act of 1798, (2nd Digt. 1158) declares that "no gift or gifts of any slave or slaves shall be good or sufficient to pass any estate in such slave or slaves, to any person or persons whatever, unless the same be made by will, duly proved and recorded, or by deed in writing to be proved by *two witnesses*, or acknowledged by the donor, and recorded in the county court, or court of quarter sessions, where one of the parties lives, or in the district court or court of appeals, within eight months after the date of such deed."

The 42d section restricts the application of the 41st, to gifts of slaves, "whereof the donors have, notwithstanding such gifts remained in possession." And the 43d section of the same act saves the rights of creditors and purchasers until the donee shall have remained in possession at least three years.

The 41st section alone applies to this case as the **PYLE**  
 donor retained the possession, and that section seems **vs.**  
 to require, not only that there shall be a deed, but **MAULDING.**  
 also, that it shall be actually recorded within eight  
 months after its date, upon the acknowledgment of  
 the donor, or upon proof of its execution, by two  
 witnesses. The recording, as well as the deed itself,  
 is made indispensable to the title.

The language of this section is in substance like  
 that of 27th H. VIII. C. 16, sec. 2, requiring deeds  
 of bargain and sale to be recorded. In each the de-  
 claration is, in substance, that no title shall pass, &c.  
 And according to the settled and practical interpre-  
 tation in England of the statute of enrolments of  
 H. VIII, a deed of bargain and sale was inoperative,  
 as between bargainor and bargainee, unless it had  
 been recorded within the time prescribed by the  
 statute; and when it had been so recorded, the title  
 vested *ab initio*, or from the delivery, by relation.

According to  
 the settled in-  
 terpretation  
 in England of  
 the statute of  
 H. 8, which  
 requires deeds  
 of bargain  
 and sale to be  
 recorded, a  
 deed of bar-  
 gain and sale  
 does not pass  
 the title even  
 from bargain-  
 or to bar-  
 gainee, unless  
 the deed be re-  
 corded within  
 the time pre-  
 scribed by  
 that statute.

It seems to us that the 41st section of our statute  
 of '98, must be construed to have the same opera-  
 tion and effect as to gifts of slaves by deed without  
 actual change of possession, as the 2nd section of  
 the 16th ch. of the statute of H. VIII. has been uni-  
 formly allowed to have as to deeds of bargain and  
 sale.

It is true, that the reason assigned in the preamble  
 for enacting the 41st sec. of the act of 1798, is the  
 security of *bona fide* creditors and purchasers of  
 donors of slaves; and hence the inference might be  
 drawn that, saving the rights of such persons, deeds  
 of gift of slaves, without recording, and without any  
 change of possession in fact, might be valid and  
 effectual between the parties to the deeds. But the  
 security of creditors and purchasers was also the  
 chief object of the statute of enrolments of H. VIII.;  
 nevertheless, the registration of the deed, as re-  
 quired by the statute, was ever deemed indispensa-  
 ble to pass the title from the vendor, because par-  
 liament, in its wisdom, saw fit to require the record-  
 ing of the deed as essential to the passing of the title to  
 the vendee.

It is also true that the statute of Frauds (1st Dig't.  
 017-18) declares that conveyances intended for de-

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frauding creditors or purchasers, shall be void *except as between the parties to the deeds*, and that conveyances of goods and chattles, without consideration, or upon consideration not deemed valuable in law, shall be deemed *fraudulent*, unless possession shall, bona fide, remain with the donee, or unless the deed shall be acknowledged or proved by two witnesses, and deposited for registration, within eight months after the "*execution thereof*." But this statute should not materially influence the construction of the 41st section of that of 1798, for several reasons.

1st. The Statute of Frauds was enacted in 1796, and the Legislature, with that act before them, re-enacted, from a Virginia statute of 1758, the 41st section of the act of 1798, requiring expressly that, in order to *pass* the title to a slave from a donor to a donee, there should not only be a deed proved, or acknowledged and deposited for registration, but also that the deed shall be actually recorded within eight months, not from its "*execution*," but from its "*date*."

2d. The 41st section of the statute of 1798, applies expressly to the parties to the gift, and governs the question of right between *them*. But the statute of frauds, of 1796, applies to creditors and purchasers only, and does not affect the right as between the parties to the deed, unless they *actually* intended it for defrauding others; and then it shall be binding between themselves: but if there be no fraud in fact in a deed of gift of chattles, the statute of frauds does not operate upon the deed except so far as bona creditors or purchasers of the donor may be concerned; and consequently, though the deed may be void as to creditors or purchasers, in consequence of an omission to have it deposited in the proper time and place to be recorded; yet, as between the parties themselves, it can have no greater efficacy than it would have had without the statute of frauds, and will therefore pass to the donee no right unless it can have such an operation independently of that statute.

3d. The statute of frauds applies to chattles: the 41st section of the act of '98 applies to slaves, and to slaves *alone*. A deed of gift of chattles (not

including slaves) may pass a perfect title to the donee, although there never was a delivery in fact of the chattles, and although the deed had never been recorded or deposited for registration, at any time either before or after the lapse of eight months from its *execution* or its *date*. It seems, therefore, that the legislature deemed it proper to have a peculiar law for deeds of gift of slaves—and we cannot perceive any reason why that law shall not be expounded according to the plain import of its own express words: and thus construing it, there can be no doubt that the *recording* of the deed is made as indispensable as the *execution* of a deed, and that no title can pass without *both* as expressly required by the statute, or unless actual possession in the donee accompany and follow the gift.

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Even if the act of 1798 had never been passed, a parol gift of a slave would not have vested in the donee any title unless possession had followed the gift, *and a deed, without registration, and without an actual delivery of the slave, might have passed to the donee all the right of the donor*. This is a strong consideration tending to prove that the chief object of the 41st section of the act of 1798 was to make the title dependent on the recording of the deed.

The deed, in this case, would have been recorded in due time, if it had been recorded the 27th of June, 1820, upon the proof of two witnesses. The months intended by the statute are callendar, though according to the ancient rule they would have been lunar; and in computing the time, the day of the date must be excluded.—(Cowp. 714.)

But the deed had been proved by only one witness prior to the lapse of the eight months—and thereupon, the recording of it on the 27th of June upon the proof of only one witness, was a nugatory act even if it were then thus recorded. There is no proof that it had been recorded within eight months of its date, either upon acknowledgment, or upon the proof of two subscribing witnesses, and consequently according to the law of '98 it can have no operation transferring title or possession, *unless there had been some valuable consideration for it*.

If a deed of gift of slaves be recorded within eight *callendar* months, it is sufficient. In computing the eight months, the time within which a deed of gift of slaves is required to be recorded, the day of the date of the deed must be excluded. To record a deed on the testimony of

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one witness,  
in cases  
where the law  
requires the  
attestation  
of two wit-  
nesses, is a  
negatory act.

But the circuit judge instructed the jury that if it had been recorded, without qualification as to the time or mode, a delivery, in fact, of the slaves was not necessary to the title of the appellee. In this unqualified generality of expression an erroneous doctrine was implied, and the instruction, as given, did not present, with proper distinctness, the true application of the law.

II. The damages exceed the maximum which the facts authorized the jury to find. The appellant could not be, according to the proof, liable for hire prior to his purchase in June, 1826, and the Jury have assessed more than the established value of the use from that time to the finding.

Wherefore, the judgment of the circuit court is reversed and the cause remanded for a new trial.

*Morehead*, for appellant; *Crittenden*, for appellee.

## The Commonwealth for the use of Estill County Court, vs. McFarland.

Case 56.

Error to the Estill Circuit; FRENCH, Judge.

*County Court. Collector of County Levy. Relator. Costs.*

April 13.

Judge NICHOLAS delivered the opinion of the Court.

County court cannot (even as relator) maintain an action against the collector of the county levy on his official bond.

THIS is an action in the name of the Commonwealth for the use of the Estill county court, against McFarland on his official bond, as collector of the county levy.

The only question presented is, could the county court sue on the bond as relator? We think not.— It has been settled, that in an action like this, the relator is the substantial plaintiff and responsible for costs. Of course he should not only have a right to sue on the bond, but should be capable of suing and being sued. We know of no law, which authorizes the county court to maintain the suit. It has no corporate capacity, that would give it such right.

Wherefore judgment is affirmed with costs.

*Turner* for plaintiffs; *Owsley* for defendants.

**Turner vs. Roby's Ex'r.**

COVENANT.

Error to the Jefferson Circuit, Pirtle Judge.

Case 57.

*Covenant. Annual Instalments. Interest.*

Chief Justice ROBERTSON delivered the Opinion of the Court. April 14.

In 1830, the Executor of Marcus Roby obtained a judgment against Robert Turner for \$1220, in an action of covenant on the following writing: Covenant,  
instruction  
of.

"From papers presented me this day by Mr. Marcus Roby now of Georgia, where he and myself was bound—viz. One note in favor of Benj. Wilkerson for \$350 on interest from the 20th of February, 1807, until this day—one note in favor of Joshua Calloway, sen'r for \$100, one other note for \$25 in favor of said Calloway with interest from the 19th of February, 1808 until this day—one in favor of said Marcus Roby, Esq for \$6 44 with interest from the 11th August, 1808—one judgment in favor of Stephen G Heard for \$260, with interest from the 7th January, 1809—in all amounting to \$724 59, which appears to be a correct statement after taking out \$367 50, acknowledged by Mr. Roby to have been paid by Joseph Turner—which shall be discharged in equal annual payments until paid, if not previously settled and paid by Doctor William Turner or Joseph Turner, this 2nd day of June, 1819.

**"R. TURNER."**

After verdict on a writ of enquiry of damages the defendant in the action, now plaintiff in error, moved in arrest of judgment, insisting, as he now insists, that the writing sued on, did not import a covenant to pay Roby any thing, and that even if it did the verdict was for a larger sum than the Jury had a right to assess.

The writing is not as precise or formal as the written memorials of contracts usually are, or as might be necessary to show, at once and with perfect certainty, the whole object and intention of the parties. But we feel no difficulty in deciding that it is in fact and in legal effect, a contract by Turner to pay money to Roby. It acknowledges that Roby

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had presented to Turner a *judgment and certain notes* in which they had been bound in Georgia, and a small note *from Turner to Roby*; hence the inference is plain that the joint notes had been taken up by and in the possession of Roby, and we may also infer that the judgment had also been discharged by him, and that nothing had been contributed by the plaintiff in error excepting the \$367 50 admitted to have been paid by *Joseph Turner*. This latter inference, more liable to doubt than the first, is fortified by the fact that one of the notes was payable to Roby himself, and that, nevertheless, that note and the judgment and other notes were all included *alike* in the calculation and did with their accruing interest, amount in the aggregate, to about \$724 after deducting the \$367 paid by Joseph Turner, if that sum had been (as we may presume) paid for the plaintiff in error by his friend or agent five or six years prior to the date of the covenant.

Here is then a direct acknowledgment by Turner that he owed Roby, and the items constituting the foundation of his indebtedness and enumerated and described for the purpose of preventing future controversy and of saving the trouble of any other settlement—and after thus ascertaining the amount due, Turner *covenanted to pay it*.—when he said—“*which shall be discharged in equal annual payments,*” &c.—What did he mean? To whom was he to pay? and what was he to pay? He was to pay to Roby—1st because Roby had paid the original debts, as shewn by the production of the notes, &c.—2nd because the note from Turner to Roby was certainly to be paid to the latter, and that note and the other items enumerated in the settlement seem to have been included, *in the same manner*, in the estimate. 3rd If the intention had been to make payment to the original creditors, Roby had no authority to agree for them that they would receive payment in annual instalments, and, as already suggested, the production of the notes was evidence that they had been paid off. Then what amount was to be paid by Turner to Roby? If they had been both principal obligors the covenant would bind Turner to pay only one half of \$724 59: but some of the foregoing considerations

tend to shew that Roby was only the surety of Turner, and when the latter said "which shall be discharged" (immediately after acknowledging a balance of \$724 59) he should be understood, according to the literal and grammatical import of the covenant, to allude to the \$724 59, the only antecedent to which there could have been any proper or intelligible reference.

As the whole amount was to have been paid in annual instalments, without further specification, the only sensible or practicable construction would distribute the payment of \$724 59 into two equal instalments of one and two years from the date of the covenant.

The declaration was properly drawn according to the foregoing construction and effect of the covenant, and contains an averment that neither Doctor Turner nor Joseph Turner nor the plaintiff in error had ever paid the amount covenanted to be paid or any part of it. The declaration is therefore good.

But the verdict is for more than the Jury had a right to assess. Whatever may have been the actual intention of the parties, the legal effect of the covenant is that interest should not accrue on the amount of either instalment until it became due and payable; and thus calculating the interest the gross amount due at the time of the verdict was less than \$1220.

Whereupon the judgment for \$1220 is erroneous—and must be reversed, and the cause must be remanded for a new trial.

*Denny and Hardin* for plaintiff; *Crittenden* for defendant.

When the covenant is to pay (a certain sum) in annual instalments, decided that the whole sum to be paid should be divided into two equal instalments, payable in one and two years from date of the covenant.

Nor will interest accrue on either of such instalments until they become due and payable.



CHANCERY. **Wood & Hardin vs. Kendall & Head.**

Error to the Franklin Circuit, MAYES, Judge.

Case 58. *Jurisdiction. Chancellor. Failure of Consideration.*April 16. *Escrow.*

Chief Justice ROBERTSON delivered the Opinion of the Court.

THIS writ of error seeks the reversal of a decree perpetuating an Injunction to a judgment by default obtained against the defendants Kendall & Head by W. Wood assignee of the obligee, in a suit commenced in 1827, on the following note:

"We or either of us promise to pay Ben. Hardin  
"two hundred and fifty dollars this 7th of May,  
"1818.

(Seal.)

"JOHN A. HEAD, (Seal)

"JEREMIAH KENDALL, (Seal.)

"Teste: JO. CLARK,

The Bill alleges that the note was given in consideration of an undertaking by Hardin to appear as counsel for one Wharton Ransdale in a prosecution pending against him for murder—that the defendants in error signed it merely as securities of the mother of Ransdale whose name to the first seal Hardin promised to procure—that she never subscribed to the note—and that Hardin did not appear as counsel for Ransdale on his trial.

Hardin in his answer, says—"that a number of persons were indicted in the Franklin circuit court for the murder or as aiding and assisting thereto of a man by the name of Carter—that there was a special term in May he believes for the trial, and he was employed for the whole of them: that a number of them talked to him, but none signed the notes but the complainants—as to the story of Ann Ransdale he recollects nothing about it, and he does not believe there is any truth in it—he did not know how many would sign the notes. The whole contract appears on two notes now in suit in the name of Wood, and he recollects no more than what those state—except what is to be hereafter stated, he refers to both those notes and the endorsements."—He then says that he had talked to Kendall "several

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"times about the fees since 1818, and offered to leave  
 "the matter to Geo. M. Bibb, as he knew all about  
 "the matter."

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He then refers to the record of the prosecution which shows that Wharton Ransdale, James Ransdale, Elijah Kendall, John Kendall and Zepheniah Jackson were all indicted for the murder of Carter—that a *nolle prosequi* was entered as to the Kendalls and James Ransdale, on the 8th of May, 1818; and that the trial of Wharton Ransdale and of Jackson was, on the same day, continued until the next term. Hardin then states in his answer "that he did appear and argue all points arising at the May court when a part of the persons, James Ransdale, Elijah Kendall and John Kendall were discharged"—and admits that he did not attend at the next term when Wharton Ransdale and Jackson were tried.

One of the notes referred to in the answer is that on which the judgment was rendered, and the other is as follows:—

"We have employed Benjamin Hardin as one of  
 "the counsel for Wharton Ransdale, James Ransdale,  
 "Elijah Kendall, John Kendall and Zepheniah  
 "Jackson who are indicted in the Franklin circuit  
 "court for murder, now we do agree to give said  
 "Hardin two hundred and fifty dollars in addition  
 "to his fee already promised if all the persons are  
 "discharged from the present prosecutions or if part  
 "only are discharged then for each one that is dis-  
 "charged fifty dollars.

(Seal.)

"JOHN A. HEAD, (Seal.)

"JEREMIAH KENDALL, (Seal.)

"Teste: Jo. CLARK,

(Endorsement.)

"N. B. I have been employed for the persons  
 "within named, now if I am not present when the  
 "whole of them are tried I do agree to relinquish my  
 "fee in that proportion—that is if absent when any  
 "one is tried one fifth and in that proportion for the  
 "rest."

Only two depositions were read in the case. Ben-

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jamin Head swore that Hardin was employed for \$25 to endeavor to procure an order for bailing Wharton Ransdale, and that afterwards the defendants in error agreed to give him \$250 to defend Ransdale on his final trial, and that the note on which the judgment in question was rendered was given in consideration of the latter agreement, and does not include the fee of \$25. Benjamin Ransdale swore substantially to the same facts. Head also swore that Hardin agreed that he would charge nothing unless he should appear on the trial. Ransdale swore that the contract for the \$250 was made after the prosecution had been entered: and both of them swore that Hardin was not at the trial.

The plaintiffs insist 1st that there was only a partial failure of consideration, and 2nd that if the consideration totally failed the chancellor had no jurisdiction because the remedy was complete at law.

On the 1st point the case is not perfectly clear: but on full consideration of all the facts we are inclined to concur with the circuit court in the opinion that a total failure of consideration has been established. There can be no good reason for doubting that if the sole consideration of the note was Hardin's agreement to appear for Wharton Ransdale on his final trial the entire consideration failed.

However the fact may, in truth be, the testimony will not permit this court to presume that the fee of \$25 for appearing on the incidental preliminary motion made any part of the consideration of the note.

Then the only question to be considered in this branch of the case is, whether the note in controversy was given, as the witnesses swore it was, as a fee for appearing for Wharton Ransdale alone, or as a fee for appearing for all the persons who were prosecuted.

Notwithstanding the positive testimony contained in the depositions, the note without date for a contingent fee creates some doubt as to the true consideration of the other note, the judgment on which has been enjoined. The contingent fee was promised for all the persons who were prosecuted; and the plain-

tiffs argue that the inference is clear, that the unconditional note was given also as a fee for attending to all the cases; and that therefore as three of the parties were discharged through Hardin's instrumentality, the consideration of the latter note failed only in part. This would be the rational inference in the absence of any positive evidence to the contrary.— But there is no *necessary* conflict between the depositions and any thing expressed in the conditional note. Though that note was given as "*an additional fee*" to Hardin it might, nevertheless, have been the only fee agreed to be given *by any of the persons prosecuted* except Wharton Ransdale. If it were the only fee promised for the other four individuals it was "*an additional fee*" to Hardin—and it was not improperly described as such.

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As therefore two witnesses have sworn positively and the answer of Hardin is not direct or explicit (as the consequence doubtless of a lapse of memory as to the precise circumstances of a transaction so long transpired) we do not feel authorised to dissent from the conclusion of the circuit Judge as to the actual consideration of the note. It is true the record shews that the prosecution was continued on the 8th, and consequently B. Ransdale was inaccurate in his recollection when he swore that the note (dated the 7th) was executed after the continuance. But this discrepancy is not of such a character as to discredit the witness. Such a mistake might frequently be made by the most scrupulously honest men.— Besides it is far from being improbable that the witness was not mistaken as to the day of the continuance, but confounded the continuance with the failure on the 7th to obtain bail, directly after which and on the same day the note, as he said, was given. And two circumstances, in some degree, tend to fortify the depositions—1st, Hardin in his answer, says, that he was employed by all the persons who were prosecuted, but he did not say that each agreed to give him the same fee, nor does he alledge that the unconditional note was given for any other consideration than that averred as the only one in the Bill — 2nd, It may not be unreasonable to infer, (from the fact that Wharton Ransdale was not allowed bail and

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HEAD.

Statute which authorizes the impeachment of the consideration of specialties by plea at law, has not ousted the chancellor of the pre-existing jurisdiction which he possessed of relieving against obligations when the entire consideration had failed in consequence of obligee's delinquency.— And the chancellor yet has jurisdiction in such cases, provided no attempt to impeach the consideration has been made at law.

Chancellor has no jurisdiction to enjoin a judgment on the ground that the obligation on which it was rendered was delivered as an *escrow*. Obligation cannot be an *escrow* after its delivery to obligee.

that James Ransdale and the two Kendalls were not only bailed but discharged without trial,) that Wharton was the person who actually perpetrated the homicide, and that the other three were not deemed guilty of any felonious participation in the imputed crime. Hence it might seem, at least probable, that a more liberal and certain fee would have been demanded and have been given by him than by them. However there is nothing in the record sufficient to control the positive and unimpeached testimony of the only two witnesses.

On the 2nd point there is less doubt.—Prior to the enactment of our statute authorising the impeachment of the consideration of specialties by plea at law, equity had jurisdiction to relieve against a judgment on an obligation (in such a case as this) when the entire consideration had failed in consequence of the delinquency of the obligee without the fault or interference of the obligor, and when an attempt to enforce the obligation by legal means would have been perverting the law to purposes of injustice and oppression. The statute has not ousted this pre-existing jurisdiction of Chancery. But now there is a concurrent jurisdiction, in such a case, provided no attempt to impeach the consideration shall have been made at law.

The ground chiefly relied on when the Bill was filed was, that the note had only been delivered as an *escrow*. That ground was however abandoned; and was untenable if it had not been relinquished—1st, Because the Chancellor had no jurisdiction to enjoin the judgment on such an allegation. 2nd, Because there is no proof of the allegation—and 3rd, Because the obligation could not have been an *escrow* after its delivery to the obligee.

It may not be improper however to remark, that some countenance was given to the allegation and some doubt (yet unexplained) was excited by the fact that *the first seal remained blank*.

It may be observed also that the Bill itself is not, in all respects, as clear or as accurate in its allegations as such Bills generally are, or as it is advisable that they should ever be. Altogether the case is so

confused as to leave ground for some doubt and suspicion respecting what may be true and just between the parties.

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RUTLEDGE.

But carefully considering all the circumstances in all their bearings, we do not feel at liberty to reverse the decree of the circuit court.

Wherefore the decree must be affirmed:

*Hardin* for plaintiffs; *Sanders* for defendants.

## Bishop vs. Rutledge.

Error to the Christian Circuit; SHACKLEFORD, Judge.

*Mortgage. Usury.*

Judge UNDERWOOD delivered the opinion of the court.  
Judge Nicholas did not sit.

CHANCERY.

Case 52.

April 16.

On the 7th of January, 1828, Bishop executed an absolute bill of sale to Rutledge, for a slave, in consideration of \$200, paid him. On the same day Rutledge bound himself to Bishop in the penalty of \$400 to reconvey the slave whenever the \$200 were paid, provided the slave was living at that time; but if the slave died before the payment of the money, then Bishop was still held bound for the money.

In consideration of \$200 paid to him A executes to B an absolute bill of sale of a slave, on the same day B binds himself to reconvey the slave to A whenever the \$200 are paid, provided the slave was living at that time; but if the slave died before the payment of the money then A was still to be bound for the money, decided that the contract between the parties was a mortgage intended to secure the pay-

On the 22d of January, 1830, Bishop filed his bill against Rutledge for the purpose of redeeming the slave, treating the transaction as a mortgage tainted with usury. The court dismissed his bill without prejudice.

Viewing the contract between the parties as evidenced by the writings, there can be no doubt that it was only a pledge or mortgage of the slave for the purpose of securing the payment of \$200 advanced, and that it was intended to balance the interest of the money with the services of the slave; and so far usurious, according to repeated decisions of this court. Under this view we perceive no reason why relief should not have been granted. All that Rutledge could equitably demand was a return of his

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ment of \$200 advanced & that it was designed to balance the interest of the money against the services of the slave and was so far usurious; and that all that B could demand was a return of his \$200 with interest, subject to a credit to the amount of the value of the services of the slave.

\$200 with interest from the time he advanced it, subject to a credit for the value of the services of the slave. The court should have adjusted the amount agreeably to this rule, and if a balance remained in favor of Rutledge, the slave should have been sold to raise it, if not paid on a day fixed for that purpose. This doctrine is in conformity to the principles settled in the case of *Field vs. Beeler, &c.* 3 Bibb, 19.

But Rutledge contends that there has been a mistake in reducing their contract to writing in this, that it was agreed that he should possess and enjoy the services of the slave for one year before Bishop could redeem: whereas according to the writing, Bishop had the right to redeem before the expiration of one year from the date of the contract. If it be conceded that the mistake contended for exists, we do not perceive how it alters the merits of the present controversy. The Bill was not filed until after the expiration of two years from the date of the contract. It may however be contended that if Bishop did not redeem on the last day of the year which Rutledge was to hold the slave, that his failure, amounted to a forfeiture of his right to redeem forever thereafter. Such a construction we conceive would be in direct opposition to the obvious meaning of the contract, and cannot be tolerated.—We do not perceive the least foundation for regarding the transaction as a conditional sale.

The decree is reversed with costs and the cause remanded for proceedings in conformity to this opinion.

If Bishop's claim for hire was not equal at the time he filed his bill to the principal and interest of the \$200 due Rutledge, Bishop is not entitled to costs in the circuit court.

*Crockett and Sharp* for plaintiff; *Morehead* for defendant.

**Wriston vs. Lacy.**

CASE.

Error to the Christian Circuit; SHACKLEFORD, Judge.

Case 60,

*Oyer. Record. Immaterial Issue. Suit, dismissal of.  
Accord and Satisfaction.*

Chief Justice ROBERTSON, delivered the Opinion of the Court. April 17.  
Judge Nicholas did not sit.

To an action on the case, instituted by Sarah Ann Wriston against Asa Lacy, for seducing her daughter Polly Wriston, whilst in her service, the defendant pleaded in bar of the further prosecution of the suit—that since the last continuance, to wit “On the 20th day of February, 1830, at the circuit aforesaid, the said plaintiff *compromised* said suit, and by her instrument of writing, *acknowledged herself satisfied in full* for the cause of action aforesaid, and by the same writing directed the clerk of the Christian circuit court to dismiss the said suit, by said defendant paying one-half of the costs which had accrued in all on said suit, except lawyers’ fees; which said writing is now here to the court shewn; the date whereof is the day and year aforesaid, and concluded with appropriate averment, of payment of one-half of the costs which had accrued.

The plaintiff replied, in substance, that the defendant had not paid one-half of the costs as he had alleged.

A jury empannelled to try the issue having returned a verdict for the plaintiff for \$350, in damages, the circuit court arrested the judgment, and the plaintiff failing to plead over, final judgment was rendered against her.

The only reason assigned for the arrest is the alleged immateriality of the issue: and as the declaration is sufficient, there can be no good cause for the arrest, unless the plea be good, and the replication be bad—for if the plea be insufficient, the defendant could not take advantage of the immateriality in the issue resulting from his own fault; and if both the plea and the replication be substantially good, the issue was material.

When defendant's plea is insufficient, and plaintiff joins issue thereon, defendant cannot arrest the judgment on the ground of the immateriality of the issue.



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When there was no *oyer* craved of a writing mentioned in a plea, such writing does not constitute a part of the record; and it will be taken to be such a writing as it is described, in the plea, to be.

A mere agreement to dismiss a suit is not pleadable.

To constitute a bar to the prosecution of a suit, there must be an accord, as to the whole cause of action, for valuable consideration actually received from the defendant.

As there was no *oyer* of the writing, it is no part of the record, and must be taken to be as it is described in the plea. Admitting every thing alleged in the plea, the writing was not an *extinguishment* of the cause of action, but could operate only as *evidence* in support of the allegation that the plaintiff had compromised the suit—received some satisfaction—and directed the clerk to dismiss the suit. The plea therefore unnecessarily referred to the writing. It was not a release.

The subject matter of the plea is an alleged accord and satisfaction: and if all its allegations taken together do not shew such an accord and satisfaction as should have barred the further prosecution of the suit, the plea is fatally defective. A mere agreement to dismiss the suit was not pleadable:—to constitute a bar there must have been an accord, as to the whole cause of action, for a valuable consideration actually received from the defendant. It may be doubted whether the plea presents any such ground of defence. It does not aver what satisfaction had been received; it does not even alledge directly that any satisfaction had been received, or that there was even any valuable consideration for the agreement. It barely suggests that the plaintiff had *admitted*, that she had been “satisfied in full,” and directed the suit to be dismissed on payment by the defendant, of one half of the costs which had accrued. Nor is there even an intimation that the satisfaction, (if any) had been received from the defendant, unless the payment of his half of the costs could be deemed a legal satisfaction: but that is not stated in the plea as the actual consideration of the agreement, or as the alleged satisfaction; and we doubt whether it could be so considered, or whether, if so considered, it could be deemed a legal satisfaction of the cause of action. But if the plea be good, it can be so only on the hypothesis that the payment of half the costs was a condition precedent to the dismissal of the suit: and then the condition traversing the payment would certainly be responsive to the plea, and the issue would be material. The replication does not help the plea nor supply any of

its defects; it only admits that the plaintiff had said in writing that she was satisfied; but how, or by-whom, cannot be inferred, so as to enable the court to decide on the face of the plea that the satisfaction was sufficient to bar the further prosecution of the suit. It is not therefore necessary to decide on the sufficiency of the plea; because if it be good the replication is also good; and if the plea be bad, the circuit court ought to have arrested the judgment on the verdict; and therefore, in any event, the judgment is erroneous.

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EX'R.  
VS.  
PEARCE.

Wherefore, the judgment of the circuit court is reversed, and the cause remanded with instructions to enter judgment on the verdict of the jury.

*Brown*, for plaintiff; *Morehead*, for defendant.

## Moody's Ex'r. vs. Pearce.

CASE.

Error to the Nelson Circuit; BOOKER, Judge.

Case 61

*Aliens. Jurors. New Trial. Challenge.*

Chief Justice ROBERTSON, delivered the opinion of the Court: Judge Nicholas did not sit.

April 17

MOODY's administrator having obtained a verdict against Pearce for \$200 in damages in an action on the case for fraud, in the sale of a "jack-ass," Pearce moved for a new trial, on two grounds—1st, that the verdict was not authorised by the evidence; 2d, that he had discovered, after the trial, that three of the jurors were aliens or unnaturalized citizens.

The verdict was set aside and a new trial awarded, on the last ground. Afterwards, with the permission of the court, but without the consent of the plaintiff, the statute of limitations was pleaded; and thereupon a jury, sworn to try the issue of not guilty, and an issue on the statute of limitations, found a verdict for the defendant which the court refused to set aside on the motion of the plaintiff for a new trial.

MOODY'S  
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PEARCE.

The only question presented by this writ of error, is whether or not the circuit court erred in granting the new trial to the defendants? (For we cannot decide that, in allowing the statute of limitations to be pleaded, the circuit court abused its discretion.)

Whether the second ground for a new trial was sufficient, is a vexed question not clearly settled, so far as we know, by authority. The only decision which we have seen directly on the point was given by the supreme court of Pennsylvania, in the case of *Hollingsworth vs. Duane*, 4th Dallas, 353-4. In that case the court decided, after a survey of numerous authorities, that after verdict, the fact, that one of the jurors was an alien, was not, *per se*, good cause for a new trial; and an examination of the authorities cited in that case, would incline us to the opinion, that the reason which influenced the decision was that, after a fair trial on the merits, a technical objection to a juror not affecting *his capacity or his impartiality*, should not be allowed to disturb the verdict. Whether this be a sufficient reason for the exception thus made by the court of Pennsylvania from the general rule that whatever would have been good cause of challenge may, if unknown at the proper time for challenge, be sufficient cause for a new trial, we shall not now determine. Supposing that no other point was presented by the record, we ordered a supercedeas. But a more careful examination of the evidence exhibited by the bill of exceptions has resulted in the conviction that the facts proved on the first trial did not justify the first verdict, and that, therefore, an opinion on the sufficiency or insufficiency of the second ground for a new trial, is not indispensable to the decision of this case, and we shall therefore reserve a decision of that question until a more suitable occasion shall occur, when the court may be full.

General rule is, that whatever would have been good cause of challenge may, if unknown at the proper time for a challenge, be sufficient cause for a new trial.

Whether discovery after the trial that some of the jury were aliens or unnaturalized citizens, is sufficient ground for a new trial? Quære?

There was no proof of the nature of the contract, nor of the price given for the jack; nor of his value if he had been unexceptionable. Consequently there is nothing in the record to shew that the jury had a right to assess the damages to the amount of \$200,

because the nature and extent of the alledged injury had not been proved; and no facts appeared which furnished any criterion for the assessment of damages.

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Wherefore, whether the circuit court assigned a sufficient or an insufficient reason for setting aside the first verdict, its judgment was right, and the new trial was proper.

Judgment affirmed.

Rudd, for plaintiff.

## Garner vs. Beaty.

AND

## Garner vs. Catron.

CHANCERY.

Error to the Wayne Circuit; BRIDGES, Judge.

Case 62.

*Partners. Witness. Decree. Evidence. Auditor's Report. Cross-bill. Subpœna.*

Judge UNDERWOOD delivered the opinion of the Court.  
Judge NICHOLAS did not sit.

April 17.

PREVIOUS to the 11th of August, 1817, Garner and Catron had been engaged boring for salt water, but not having succeeded according to their wishes, on that day they entered into an article of agreement with Beaty. It was in substance stated that Beaty should continue boring in the same well until he had gone down 500 feet, unless he should sooner obtain a sufficient quantity of salt water. Garner and Catron bound themselves to convey to Beaty one-half of the well and the 50 acres of land on which it was situated. In case salt water was obtained the parties agreed "to be at equal expenses in proportion to their interest in the well, in providing mettle, building furnaces, and making improvements for the manufacturing of salt, and in the same proportion are to draw their respective shares of profit; and on all subjects, when any improve-

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ment or plan is to be adopted for the use or benefit of the business, each party is to have a vote in proportion to the interest he holds, and a majority in the weight of interest, shall at all times control." It was further agreed that neither party should sell or give away his interest in the well or any part thereof to any person who would be disagreeable to the other partners, or without their consent in writing obtained from each. Beaty sunk the well 500 feet. He let Evans have half his interest. It does not appear whether with or without the written consent of Garner and Catron. It seems that on the 7th of August, 1816, Garner, Catron and Hawk entered into an agreement, by which the two former agreed to let Hawk have an interest in the well of one-sixth part, he agreeing to defray, in future, one-sixth of the expense incident to boring, &c., and in case a sufficient quantity of salt water was obtained to justify working the well, then he was to pay one-sixth of the expenses previously incurred. It seems that Hawk agreed to surrender one-half of his interest upon Beaty's entering into the contract aforesaid. Thus if the interest in the well and land on which it was situated, were divided into 24 parts, Beaty, or Beaty and Evans would be entitled to 12 parts, Hawk to 2, and Garner and Catron to 5 each. After Beaty had sunk the well a considerable distance, but before he had gone the 500 feet, which he afterwards completed, the parties, or at least a majority in the "weight of interest," determined to make the necessary preparation for the manufacture of salt, supposing that the quantity and quality of water obtained would justify it. Accordingly they commenced sinking a head for the well, in which, with other improvements, a considerable expense was incurred.

Beaty filed this bill against Garner, &c. praying that an account might be taken of the expenses incurred by each partner, and that they who had not paid their just portions might be compelled to pay those who had paid more than their portions.

The court appointed auditors to state the accounts and to report them to the court. This was done.

Exceptions were filed to the report, overruled by the court, except as to the allowance of interest, and a decree rendered against Garner in favor of Beaty for \$450 20 cents, subject to a credit of \$42 50, and a decree in favor of Catron for \$183 02, besides costs. To reverse these decrees Garner prosecutes appeals.

The first question worthy of consideration. relates to the admissibility of the depositions of Hawk and Evans. Their depositions were objected to upon the ground that they were incompetent witnesses, owing to their interest as partners. That they were incompetent to prove the extent of their own claims against the firm or partnership, is granted; but we cannot perceive any reason resulting from their interest, which should prevent their proving the extent of the claims of the other members of the firm. Their interest would operate, if at all, to induce them to diminish the amount of these claims. It is no objection to a witness that he swears against his interest. He ought, on that account, to be the more readily believed. Nor can Garner complain that Hawk proved the amount expended by him, because Garner was allowed, in the settlement and report of the auditors, a credit for half the amount of Hawk's claim. This testimony is furnished by Beaty. It is to his disadvantage, and he does not object to it. If Evans and Hawk, therefore, proved no more than the amount expended by the partner who might take their depositions, we could not see any good ground of objection. But they go further, and attempt to diminish the amount of Garner's claim. So far as their depositions are calculated to have that effect, they would be promoting their own interest, and to that extent they were incompetent, and their depositions, that far, should have been disregarded. See *Sharp vs. Morrow &c.*, 6 Mon. 305.

The report of the auditors and the decrees founded thereon, cannot be sustained. According to the case of *Hammon and wife vs. Pearl &c.* 6 Mon. 413, the evidence to sustain a decree must appear upon the record. This court cannot revise the proceedings of an inferior tribunal, and come to any

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ings of an inferior tribunal so as to come to any satisfactory conclusion, unless the foundation upon which the decree of the inferior tribunal rests, is made to appear.

Auditor must write down the statements of the witnesses, that may be sworn before him, and report to the court the statements of the witnesses, and not his conclusions drawn from them.

satisfactory conclusion; unless the foundation upon which the decree rests, is made to appear. There are three items for \$38 75, \$78 63 and \$111 88, allowed Beaty by the auditors, as accruing in his favor since filing his bill. The only evidence in support of these items, is a statement in the report of the auditors, that proof was made before them of their correctness. This we conceive is not sufficient. What the witnesses deposed should be taken down and reported, and not the conclusions of the auditors, from the statements made by the witnesses. The court should base its decree upon the statements of the witnesses, and not the conclusions of the auditors drawn from their statements. The testimony should be exhibited, so that the court may see that the conclusions of the auditors are correct.

But the principles upon which the report was made, are incorrect, and even if they were not, the decree is erroneous in not giving effect to the report as made. The auditors report the total amount of expenditure, in preparing to manufacture salt, at \$4, 381 63. To make this aggregate, Beaty contributed, according to the report, \$2,339 28, Evans \$310 71, Catron \$1, 91 13, Hawk \$458 61, and Garner \$73 87. The auditors then give Beaty the benefit of the expenditure made by Evans, and by adding the two sums together, make a total of \$2,650 02, which they regard Beaty to have advanced, being \$459 20; more than half of the whole expenditure, and for this amount (except \$9, which we supposed was omitted through mistake) the court decreed in favor of Beaty against Garner, subject to a credit for \$42 50, that being the proceeds of the sale of some articles belonging to the firm, after paying the commissioner who sold them. The auditors reported that Beaty was chargeable with \$91, for a copper pipe which he had appropriated, and it seems that his account charges the firm with about that sum for a copper pipe, purchased in Lexington, and the expense of hauling it to the well. He certainly should have been required to account for this pipe so used by him. Deducting the \$91 from his account, and he would only be entitled to a decree for \$368 20,

instead of \$459 20, according to the report of the auditors.

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The amount of Hawk's account for labor done on the well, is equally divided between Catron and Garner, and their expenditures are thus increased by the labor of Hawk. In this way Catron's expenditures by the report are made to exceed his just proportion by the sum of \$333 02. The auditors find that Catron is indebted \$150 to Garner, and they deduct this from the \$333 02, leaving a balance of \$183 02, for which the court render a decree in favor of Catron. Thus Catron gets the benefit of Hawk's labor to the amount of \$229 30. We cannot perceive any principle of law or justice, which authorizes Catron thus to appropriate to his use the labor of Hawk. Deprive him of this allowance, and then, according to the report, the excess of his expenditure over his just portion would be only \$103 72; and if this were appropriated towards the discharge of what he owed Garner, there would be a balance against him of \$46 28 in Garner's favor. If Catron can appropriate to his use, in the settlement of the accounts of the firm, half of Hawk's labor, will he be individually responsible to Hawk for the amount? Considering Hawk as the owner of two shares out of twenty four, and as a partner, then his portion of the expense is one sixth, or \$365 13; his bill for work, which the auditors divided between Catron and Garner amounts to \$458 61. Thus it seems that Hawk did work to the value of \$93 46 more than his share of expenses as a partner came to. This sum, instead of being decreed to Hawk, is given to Catron with a good deal more, when, hereafter, Hawk, as a partner, might set up a claim against all the partners for this excess, and recover, unless the proceedings in this cause constituted a bar. We do not see how it would bar his right when, in this case, he has asserted no claim, and thus Garner might be again charged and compelled to pay money which is now decreed to Catron. The auditors have no doubt run into this error in consequence of the article of agreement between Beaty, Garner and Catron, having been signed by these three persons only. But the



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On answer, in nature of a cross-bill, a subpoena must be issued and served on the defendant thereto; unless he enter an appearance on the record or file his answer.

previous agreement of 1816, gave Hawk an interest which was not divested by the agreement of 1817, and upon no principle could Garner and Catron appropriate to themselves the labor of Hawk. The decree in favor of Catron is entirely erroneous.

We consider it proper, in a case like the present, where a bill is filed to settle the accounts of the partnership, that each partner who has claims, should, if he intends to ask a decree in his favor, exhibit his claims in the pleadings in such a manner as to apprise the party against whom the decree is sought, of their nature and extent. If this is attempted to be done in an answer, filed in the nature of a cross bill, against a co-defendant, a regular practice, which we deem it best strictly to adhere to, requires the service of a subpoena issuing upon the cross bill; unless there has been a formal appearance entered on the record or answer filed. This seems not to have been done in the case of Catron vs. Garner.

As the record now presents itself, we look upon Beaty, Evans, Garner, Catron and Hawk, as having an interest in the well, and we regard the expense incurred in preparing to manufacture salt, as a charge upon the whole of them, which should be borne in proportion to their interests.

Beaty should be held responsible for Evans, because Evans was let in under him, and without any consent on the part of Catron and Garner. At least none is shown by the record. Consequently, if Evans had failed to pay his full portion of the expense, and Beaty had paid more than his share, he must look to Evans alone for indemnity, so far as Evans ought to have contributed. And if the amount chargeable to Evans is not equal to indemnify Beaty, then he may have a decree against either Catron or Garner, or both, to the extent it may be found they are in arrear in contributing their full portions. The decrees to be severally rendered.

Upon the return of the cause, the court will recommit the report, so that it may be correctly ascertained how much each partner has expended in making the improvements. In doing this, the auditors must reject all testimony coming from any

one of the partners, which goes to establish his own account, or to diminish the account of any of the partners. So far he is an interested witness. But any one partner may make a witness of any other of the partners, to testify as to the amount of the partner calling him, but then the partner so called on, must not, in giving his testimony, attempt to establish his own account, or to diminish the account of a partner who has not called for his testimony. The partner calling for the testimony of a co-partner, risks the influence which the party called on may feel to diminish the claims of the partner calling him; but so far as the partner called on establishes, by his testimony, a claim against the firm, he is swearing against his interest, and the evidence is, therefore, the more credible.

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There are some inaccuracies and omissions in the present report, which we deem it proper to notice.

We perceive, in Beaty's account, that he charges "for cash given to Evans to pay hands \$15." Much of Evans' account is for payments made to hands. Has not this \$15 been claimed against the firm twice? Evans gives no credit for money received from Beaty to pay hands. Beaty charges \$20 as paid to Hawk. Was this payment made on account of work done by Hawk, over and above what he ought to have contributed as a partner? If so, his account ought to have been credited by it. It was not; and thus we apprehend that the commissioners, in making up the aggregate expenses of the whole work in preparing to manufacture salt, have counted this sum twice.

It is proved that a considerable quantity of salt was made, and that beaty appropriated it to his use. While he is allowed for payments made to the hands who manufactured the salt, surely he ought to have been charged with the profits of their labor, and the last set off against the first. Yet it was not done. We make these suggestions for the purpose of calling the attention of the parties to them upon the return of the cause; so that they may make their proof more precise, and that these subjects may be

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disposed of on the investigation hereafter, as the proof then made and justice shall require.

Upon the return of the cause, the court may give the parties leave to amend their pleadings if applied for. Although there are numerous amendments, to the last they seem to have been groping their way.

Both decrees reversed with costs, and the cause remanded for proceedings not inconsistent with this opinion.

*Monroe*, for appellant.

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CHANCERY.

## Brewer vs. Peed.

Case 68.

Error to the Harrison Circuit; BROWN, Judge.

*Land, conveyance of. Specific performance.*

April 18.

Chief Justice ROBERTSON delivered the Opinion of the Court.

IN 1828, Richard Brewer sold and conveyed to Philip Peed 100 acres of land, received a part of the consideration, and took his promissory note for the residue. Peed afterwards filed a bill in chancery for a rescission of the contract, because, as he alleged, fifteen acres of the land, without which he would not have made the purchase, had been conveyed by Brewer to one Tewel, in 1825, and that Brewer had fraudulently concealed that fact, and had represented himself as the owner of the whole 100 acres. In an amended bill, he alleged that he had ascertained that the fifteen acres mentioned in his bill had been conveyed to Tewel in consideration of a conveyance by him to Brewer, of fifteen acres adjoining the 100 acres, and including improvements which he supposed that he had bought, but which his deed, as written, did not include. He therefore sought a specific execution of the alleged parol contract for 100 acres, including the last described fifteen acres, and excluding the fifteen acres mentioned in the original bill, which he proposed to relinquish.

Brewer admitted in his answer that he had sold, and had thought that he had conveyed to Peed, 100 acres including the fifteen acres described in the amended bill; stated that he was illiterate, and that

the person who wrote the deed had, as he supposed, by inadvertently copying the boundary described in the deed to him (Brewer) for the tract of 100 acres as held by him prior to his exchange of fifteen acres thereof for the fifteen acres mentioned in the amended bill, included the fifteen acres conveyed by him to Tewel and omitted the fifteen acres conveyed to him by Tewel; he averred that he was willing that the mistake should be corrected by a release to him of the fifteen acres which were improperly included in his deed to Peed, and by a conveyance by himself to Peed of the other fifteen acres which had been omitted through mistake, but insisted that Peed should pay to him what remained due of the consideration, before the deed for the last mentioned fifteen acres should be made; and for enforcing his lien on the whole tract of land he made his answer a cross bill, which was never answered.

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On the hearing, the circuit court decreed that Brewer should convey to Peed, and that Peed should relinquish to him, according to the prayer in the amended bill and in the cross bill; but did not decree the payment of so much of the purchase money as remained due. This writ of error is prosecuted to reverse that decree.

Although there was no memorandum in writing showing that the fifteen acres mentioned in the amended bill, had been sold by the plaintiff to the defendant, nevertheless, as the alleged sale was admitted in the answer, a correction of the mistake in the deed, and a specific execution of the original agreement as understood by the parties, were just and proper. But the circuit court erred in decreeing a specific execution without requiring the payment of what was due from the defendant to the plaintiff for the land.

If answer admit a sale of land, it is proper to decree a conveyance of it, although there be no memorandum in writing of the sale. To decree a specific execution of a contract for the conveyance of land without requiring the payment of the purchase money which is due, is error.

The amount remaining due, including current interest (for no tender was alleged or proved,) should be paid before the vendor should be compelled to part with his title, and the circuit court must, on the return of the cause, ascertain the amount to which the plaintiff is entitled, and then give the defendant a day for paying it, and, if he fail to make the pay-

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ment, the plaintiff's lien should be enforced by decreeing the sale of the land. But if the money shall be paid, the contract, as sought to be enforced, should be carried into effect in the manner directed by the decree which is about to be reversed.

Although the plaintiff could not have been compelled to modify or alter the contract as exhibited by the deed, yet as defendant might have been entitled to a rescission of the contract, or to damages, and as there is some testimony tending to show that the plaintiff was unwilling, prior to the filing of the bill against him, to correct the mistake in the deed, and there is no proof of a tender by the defendant, each party must be deemed to have been in equal fault, and therefore there should be no decree for costs in the circuit court.

Decree reversed, and cause remanded for proceedings and decree consistent with this opinion. The plaintiff must have his costs in this court.

*John Trimble, for plaintiff.*

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### Beal vs. Brooks' Executors and Heirs, and Reed vs. Same.

Case 64.

Error to the Bullitt Circuit; BOOKER, Judge.

*Limitation. Possession. Vendee. Elder Patentee.  
Elder entry.*

April 18.

Judge UNDERWOOD, delivered the Opinion of the Court.

In deciding these controversies, we have deemed it only necessary to enquire into the protection which the plaintiffs in error derive from the lapse of time and their possession of the land. Lames entry of 21000 acres has heretofore been adjudged valid by this court and the evidence in this record fully sustains it. The claim of the defendants in error derived from this entry, without regard to their other claims, must therefore prevail, unless the plaintiffs are protected by the statute of limitations.

First in regard to the defence set up by Beal. It seems that his ancestor, in 1787, sold the 290 acres

If A who, as a vendee under an executory contract, has been in possession of land for 17 years, enter into an agreement with B, (an adversary claimant,) by which he surrenders to B the possession, and then

of land (the title to which the defendants require him to release) to James Robertson; that he entered and took possession thereof under Beal's title in 1787, left it for some months on account of the danger apprehended from Indians, returned to it in 1788 and continued to reside thereon until 1805, when he yielded the possession to Joseph Brooks, the ancestor of the defendants, who engaged to pay him for his improvements and to pay to Beal the purchase money in case he succeeded in recovering it by law from Robertson. This suit was commenced on the 10th of March 1810.

Robertson settled within the interference between the claims of Beal and Holder, both of which are covered by Lames entry. Holder's patent is older than Beal's. Joseph Brooks continued in possession after he received it from Robertson, until he instituted this suit; and if the time running between the date of the institution of the suit, and the delivery of the possession by Robertson to Brooks, should be added to the seventeen years during which Robertson lived upon the land; and the possession of Brooks, after he entered with the consent of Robertson, can be regarded as the possession of Beal; then there has been an adverse possession of more than 20 years, and the complainants ought not to have succeeded against Beal in the circuit court. We are of opinion that the possession of Brooks, under the circumstances of this case, should be regarded as the possession of Beal. Robertson as vendee entering under an executory contract was the *quasi* tenant of Beal. Brooks was well apprised of the relation subsisting between him and Beal. With this knowledge, he attempted to seduce Robertson into a surrender and disclaimer of the title, under which he had entered and which he was estopped to deny, by agreeing to pay him for his improvements and to pay the purchase money to Beal in case he recovered by law. We look upon this conduct as fraudulent in respect to Beal. No man should be permitted to buy up the claim of the vendee of land holding under an executory contract, and by so doing convert the friendly possession subsisting between the vendor and vendee into a possession ad-

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B after he has held possession 3 years, brings his suit in chancery against A's vendor, relying on his elder entry, prays for a relinquishment by A's vendor of his elder legal title, the chancellor will consider B's 3 years possession as the possession of A's vendor and by connecting the 17 years possession of A with the 3 years possession of B, make out 20 years possession in A's vendor, and therefore refuse to give relief to B.

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verse to the vendor's right. For if such a doctrine were tolerated it would tempt adverse claimants to offer rewards to faithless vendees in order to gain the possession, and then such claimants would reap advantages from the strife and contention resulting from the violations of contracts on the part of vendees, who but for the interference might have punctually performed their engagements. To prevent such consequences in the present case it seems to us, that Brooks should be considered in equity as the vendee of Robertson entering and holding under him and that he should not be permitted to set up a possession adverse to Beal and Robertson. Were we to concede him the right of instituting suit as he has done, until suit brought, we think his possession is no more than the possession of Robertson. We do not intend to decide what effect the possession of Brooks, claiming adversely, may have in a court of law; or even in a court of equity, after a continuance of that possession for such a period, as would make the statutes of limitation apply in his favor. These statutes did not operate in his favor when his bill was filed, and therefore considering the manner of his entry we think he does not apply to the chancellor with a good grace, and hence we refuse to aid him in his attitude of complainant. It follows that the court erred in deciding against Beal. Wherefore the decree as to him is reversed with costs and the cause remanded with directions to dismiss the bill so far as he is concerned. The case of Peyton & . vs. Stith, V Peters 485 sanctions the foregoing doctrines.

In the second place we must investigate the defence relied on by Reed. By his tenant Westfall he took possession of part of the land in controversy more than twenty years prior to the commencement of this suit. Westfall's cabin was built in February 1790, but he did not move into it with his family until April. We look upon the erection of the cabin as taking possession of the land. This was more than twenty years before suit was brought. The possession was continued without interruption in those claiming under Reed from the erection of Westfall's cabin down to the institution of this suit.

It seems that Hornbeck and Reed, at an early period, became equitably entitled to the whole of Edward Williams's settlement and preemption. Hornbeck took possession as far back as 1786 by clearing. His residence upon the land commenced in 1788, and was continued thereafter until his death and his heirs succeeded him, so that in his case there was more than twenty years actual residence upon the claim of Williams before this suit was brought. It appears that Westfall's cabin was built outside of the lap between the claims of Holder and Williams and as Holder's was the eldest patent the possession taken by Westfall of Williams's claim cannot be construed as extending upon the land covered by the senior grant. Indeed there is evidence shewing that Westfall cautiously avoided entering upon Holder's claim with a view to take possession within the lap. It does not appear that Hornbeck was ever possessed of any land covered by the grant to Holder. So far therefore as the decree of the circuit court requires Reed to relinquish claim to the land within the boundary of Holder's patent, we perceive no objection to it. But we think the court erred in decreeing against Reed for the land outside of Holder's patent.

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It satisfactorily appears that Hornbeck and Reed had bought the whole of Williams's settlement and preemption more than twenty years previous to the commencement of this suit. This is inferable from their taking possession of the land, claiming it under Williams and his subsequent conveyances, besides other circumstances in the cause. It is true that when Hornbeck and Reed by his tenant Westfall, took possession, it does not appear that any partition had been made between them; nor does it appear that they respectively claimed to be possessed to any particular marked and definite boundary. But as Hornbeck and Reed were together the equitable owners of the whole settlement and preemption, and both had entered and taken possession, we consider them as possessed (although no partition had been made) to the extent of Williams claim, except so far as their possession may have been restricted by the lines of older grants. Hornbeck and

If A, who owns a tract of land of a thousand acres, has been in possession 15 years, and then sells one



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hundred acres to B on which no improvement had been made prior to the sale, and thereupon B immediately enters, makes improvements and continues six years in possession, in such a case, the senior patentee could not evict B; because by coupling the six years possession of B with the 15 years possession of A, there would be 20 years adverse continued possession against the senior patentee.

Reed, from the dates of their respective entries, were the *quasi* tenants of Williams up to the time he conveyed to them. Their possession prior to the conveyances executed by Williams was the possession of Williams, and extended according to the principles so often recognized by this court to the limits of Williams' claim, except restricted as above. When Williams conveyed separate parcels to Reed and Hornbeck, the possession of each was thereafter confined to the parcel conveyed to him; but in relying upon the statute of limitations, each might well couple his separate possession of the parcel conveyed to him, from the date of his deed, with the possession of Williams by his *quasi* tenants of the entire tract, before the deeds of conveyance were executed; and thus insist upon the running of the statute from the time Williams was first possessed. If A has a tract of 1000 acres covered by an elder patent, and A has been fifteen years in possession and then sells 100 acres to B on which no improvement had been made prior to the sale, if B enters immediately, makes improvements and continues in possession six years, can the senior patentee evict B? We think not, because the statute would afford a protection, by coupling the six years possession of B under his purchase with the fifteen years prior possession of A, and thus more than twenty years adverse continued possession would be established. The principles of this case are applicable to the cause before us.

The decree of the circuit court as to Reed is reversed, and the cause remanded with directions to dispose of the cause in respect to him according to this opinion. Reed must recover his costs in this court.

*Triplett and Chapeze*, for plaintiffs; *Crittenden and Richardson*, for defendants.

**Adkinson vs. Stevens.**

Error to the Breckenridge Circuit; M'LENN, J. Jge.

COVENANT.

Case 65.

*Bill of exceptions. Amendment.*

Judge UNDERWOOD delivered the opinion of the Court.

April 18.

STEVENS instituted an action of covenant against Adkinson upon a warranty of the soundness of a slave. The breach assigned is a defect in the eyes of the slave which produced total blindness. The judgment must be reversed because there is no evidence in the record, (and the bill of exceptions purports to contain the whole) showing the extent of injury resulting from the blindness of the slave. This would depend upon the value of the slave if she was sound and her diminished value in consequence of blindness. The difference would be the criterion of damages. There is no evidence upon which an opinion can be formed in regard to this matter. At a subsequent term of the circuit court, and after the writ of error had been sued out, the defendant in error made an attempt to amend the record by showing that testimony had been given upon the trial of the cause, relative to the diminished value of the slave, in consequence of her blindness, that it had been taken down in preparing the exception, and that the paper upon which it had been written was lost, and thus to account for its non appearance in the record before us. We cannot receive the proceedings at the subsequent term of the circuit court as curing the defect. These proceedings depend for their accuracy upon the recollections of witnesses. Their recollections are in opposition to the record which is certified as full and complete. The bill of exceptions states that all the evidence given on the trial is before us. If we were to permit parol proof at a subsequent term to supply new and other evidence, we should establish a precedent endangering the principles upon which we have heretofore acted, and which might subject the verity of our records to the artifices of corrupt men. We entertain no suspicion in the present case that any thing improper has been attempted. But we must look to the consequences of the rule if once established, and these forbid its introduction.

When the bill of exceptions purports to contain the whole evidence given on the trial of a cause, an amendment of the record, at a subsequent term, by shewing that more testimony was given on the trial than the bill of exceptions contains, is inadmissible and a nugatory act.

SMITH ET AL. We shall not undertake to decide the controversy  
 vs. touching the question of unsoundness The evi-  
 SMITH. dence may be materially variant hereafter.

Judgment reversed with costs and cause remanded for a new trial.

Crittenden, for plaintiff; Richardson and Calhoon, for defendants.

## CHANCERY.

## Smith et al. vs. Smith.

Error to the Scott Circuit; HICKY, Judge.

*Guardian and ward. Estate of ward. Investiture of stock in Bank of Kentucky.*

Chief Justice ROBERTSON delivered the opinion of the court.

Anciently, guardians were held responsible for the sufficiency of all personal security which they ventured to take for the estate of their wards. And executors were held to the same strict responsibility.

But such a trustee was not responsible if he loaned the trust fund on real security deemed good at the time of the loan, or vested it in public funds.

THIS is a suit in chancery for a settlement between a guardian and his ward; and the only question presented for consideration is, whether the guardian should be held responsible for \$1600 of the money of his wards, received by him in 1818, and vested in the purchase of 16 shares of Kentucky Bank stock, assigned him as their guardian in 1819, and then at par but now greatly depreciated; or whether they should loose the depreciation and he should be exonerated from responsibility? The circuit court decreed that the wards should accept the bank stock, as a payment of \$1600, and that, consequently, the guardian should not be responsible for the depreciation.

Anciently, guardians were held responsible for the sufficiency of all personal security, which they ventured to take, for the estate of their wards; and executors were held to the same strict responsibility; Terry vs. Terry, Pre. in ch. 273. But such a trustee, was not responsible if he loaned the trust fund, on real security, deemed good at the time of the loan, or vested it in the public funds. The severity of this doctrine has been relaxed in some degree, by some more modern cases; See I. Pr. Wm. 241.

Guardian, who had vested the estate of his ward It is not necessary to decide, in this case, whether the responsibility of executors and of guardians, is now of the same kind and degree, nor how far that

of guardians, may be increased or altered, by the statutory law of this state; I. Dig 642-3. For we are of opinion that the defendant in error, (the guardian,) should be charged with the full amount of the fund, vested by him in bank stock, whether his liability be tested by common or statutory law. We cannot consider stock in the Bank of Kentucky, as "*public funds*," or in other words, government stock, depending, for its credit and security, on the faith, solvency, and stability of the government. *Fifteen of the sixteen shares of stock, had been transferred by the defendant in his own right, in 1818, (whilst he was guardian,) to one Sinclair, and were transferred to him, as guardian, by Sinclair, in 1819. He did not account to, or settle with, the county court, until the year 1827. It does not appear that he was unable to sell the stock advantageously, or without material loss, before it had depreciated essentially; If he had made an annual report, (as he ought to have done,) to the county court, the security of the wards might have been increased, and their estate saved from unnecessary peril, and from the contingencies to which the bank stock was liable.*

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in stock in the Bank of Kentucky, held, under the circumstances, responsible for the full amount of the fund so vested, notwithstanding stock in the Bank of Kentucky had greatly depreciated after the investiture of the wards' estate in it. Stock in the Bank of Kentucky is not "*public funds*."

It seems to us that, *in such a case*, the loss should fall on the guardian. He may have acted in good faith, but he did not guard the interests of his wards, with as much vigilance and circumspection as sound policy, as well as authority, wisely exacts from those to whom the estates of infants may be confided. Something more than mere *good faith* should be required of guardians.

Guardian should, in the preservation of his wards' estate, not only observe good faith but should act vigilantly and circumspectly.

It is not necessary to determine how far the guardian incurred personal responsibility, by the act of commuting the money of his wards, for bank stock. If his authority were conceded, the circumstances of this case should impose the *eventual* risk and loss on himself.

Wherefore, the decree of the circuit court is reversed, and the cause remanded, with instructions to render a decree conformable to this opinion.

Chinn, for plaintiffs; Wickliffe and Wooley, for defendants.

## CHANCERY.

## Pogue vs. Richardson, &amp;c.

Case 67.

Error to the Mercer Circuit; KELLY Judge.

*Bill, dismissal of. Error, assignment of.*

April 19.

Judge UNDERWOOD delivered the opinion of the court.

When a bill is dismissed for want of necessary parties, the dismissal should be "without prejudice" and an *absolute* dismissal on such ground is error.

Assignment of error in general terms "that the court below erred in dismissing complainant's bill" decided to embrace an error committed in the *manner* of the dismissal of the bill. This court will, to reach the justice of a case, give liberal constructions to assignments of error.

THE personal representative of Daniel Richardson, if he had any, was a necessary party. When the suit was abated by the death of said Daniel, it should have been revived against his administrator or executor, or it should have been shown by an amended bill that he had none. This matter was not suggested by counsel in the original argument, and it was overlooked by the court. For want of proper parties, the bill should have been dismissed without prejudice, and the court erred in dismissing the bill absolutely.

It is contended, however, that there can be no reversal for this cause, as it is not reached by any assignment of error. It is assigned for error in general terms, that the "court below erred in dismissing the complainant's bill." We are disposed to be liberal and not critically nice in construing assignments of error, for the purpose of reaching the justice of the case; and therefore we think such an assignment as the above is sufficient to embrace an error committed by the court in the *manner* of dismissing a bill. We have been referred to the case of Shockly vs. Niess' heirs, 3 J. J. Marshall 96 as ruling this. We are not willing to apply that case to this, because in that there was no equity in the bill, and the decision in that did not turn upon the question now made.

The decree of the circuit is reversed and the cause remanded, with instructions to permit the appellant Pogue to amend his bill, and to bring the proper parties before the court, which if he fails to do within reasonable time, the bill must be dismissed without prejudice. If the appellant amends, the court will take such other steps as may be proper to bring the cause to trial. We shall abstain from discussing the merits of the controversy, because we cannot foresee what new aspect the case may assume. The former opinion is set aside, and

this substituted. Neither party shall recover costs in this court.

*Davies*, for plaintiff; *Owsley*, for defendant.

OUTTEN  
vs.  
PALMATEER.

## Outten vs. Palmateer.

Error to the Fayette Circuit; HICKEY Judge.

*Restitution. Motion. Rule. Scire Facias.*

Chief Justice ROBERTSON, delivered the opinion of the Court.  
Judge Nicholas did not sit.

RULE. 7jm 241  
125 431

Case 68.

April 20.  
7jm 241  
118 364

PALMATEER, having succeeded in reversing a judgment which Stout's administrator had obtained against him, moved the circuit court, after the return of the mandate to that court, for a rule against the administrator and against Thomas Outten, (for whose benefit the suit was alleged to have been prosecuted,) to shew cause why they should not make restitution of money made and of slaves sold by the enforcement of the judgment prior to the reversal. The parties afterwards appeared in court, and were heard, and thereupon the court gave judgment against Outten for restitution of three several sums of money, with interest until payment.

The regularity of that proceeding, and the correctness of the judgment thus rendered, are now to be considered.

The record certified by the clerk does not shew what proof was presented on the hearing in the circuit court, and exhibits only two executions of fieri facias endorsed for Outten's benefit, and a replevin bond with an endorsement purporting to be a receipt by him. According to the practice of this court, we have looked into the record in the case in which the judgment was reversed. And that contains an affidavit filed by Outten, during the pendency of the suit in the circuit court for obtaining a continuance, and in which he stated that he was entitled to the avails of the suit, and was therefore the only person engaged in the prosecution of it.

If the record of the suit in which the judgment was obtained, shew that Outten was a party, the circuit court had authority, upon motion, to order the order of

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restitution is asked, has received the money, and also that he was a party to the suit or judgment.

When restitution of money paid under a judgment or execution is desired, if there be no record evidence that the plaintiff has received it, or no record evidence that the person who did receive was a party to the judgment, the remedy is by *scire facias* or other suit in which matters in pais may be tried and ascertained by a jury.

restitution of whatever sum official returns upon process issued on the judgment, shewed that he had received, in virtue of the judgment, prior to its reversal. But, unless he be a party to the original record, or unless, being such party, there be record or official proof that he had collected money on the judgment, a motion or rule for restitution cannot be sustained, but a *scire facias*, or other suit, in which matters in pais might be tried and ascertained by a jury, would be the appropriate mode of proceeding—2nd Salk. 588—2nd Tidd's Pra.

According to a reasonable construction and application of the foregoing rule, we are disposed to consider Outten as virtually a party when he filed his affidavit in the circuit court; that affidavit was made a part of the record by a bill of exceptions. But it does not shew that he was a beneficial party when the judgment was rendered, or afterwards; he might at any time after filing his affidavit, have parted with his interest, and thereby have become a stranger to the suit and to the record. Whether he continued to be a beneficial party, is a fact which the record does not prove, and which, therefore, should be tried, not by the record, but as other matters in pais are properly triable.

If the declaration, or any entry made by the court on its record, had shewn that the suit was prosecuted for Outten's benefit, proof *aliunde* might not be necessary, or, perhaps, proper. But the affidavit, though a part of the record, does not shew that the judgment was obtained for his benefit; or that he was then so connected with it, as to be concluded by it.

Wherefore, as there was no record proof that Outten was a party to the judgment, a rule or motion was not a proper mode of compelling restitution. The endorsements made by the clerk on the executions do not prove that the judgment was obtained for Outten's benefit, nor are they *conclusive* proof even that he was entitled to the benefit of the executions; and, therefore, restitution could be coerced only by *scire facias* or other appropriate suit.

If Outten purchased Palmateer's slaves, or other property, under execution, the subsequent reversal

If a plaintiff purchase slaves, or other property, under execution, the subsequent re-

of the judgment did not divest him of his right to the property so bought by him, unless the only cause of reversal had been some irregularity in the judgment or sale to which, as a party, he had been privy—but restitution of the price for which the property sold, would be proper against the proper party: and consequently, if Outten had been a party to the judgment, it would have been right to order him, as the circuit court did, to restore the price for which the slaves were sold to him under execution, as shewn by the sheriff's return. But even if he had been a party to the judgment, the order for restitution of the amount of the replevin bond could not have been sustained, unless the proper officer had returned on an execution on the bond, that he had collected the amount, and paid it to Outten.

Wherefore, for the foregoing reasons, but especially because the circuit court had no jurisdiction of the case upon a mere motion or rule, the order for restitution is reversed and set aside.

*Haggin*, for plaintiff; *Wickliffe and Wooley*, for defendant.

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reversal of the judgment does not divest him of his right to the slaves, or other property, unless the only cause of reversal be some irregularity in the judgment or sale, to which as a party, he was privy. Otherwise, in such case, the price for which the slaves or other property sold (as evidenced by the sheriff's return) is the proper subject of restitution.

## Clark vs. Hunt.

Appeal from the Christian Circuit; SHACKLEFORD, Judge.

*Lien, bill to enforce. Necessary parties.*

Chief Justice ROBERTSON, delivered the opinion of the Court.

CLARK filed a bill to enforce an equitable lien on a tract of land conveyed by him to Crockett, and subsequently conveyed by Crockett to Hunt. The circuit court dismissed his bill absolutely, and he appealed to this court. After delivering an opinion on the case, we directed a re-argument, which has been fully heard.

On reconsideration, our attention has been called, more closely and minutely than heretofore, to all the circumstances entitled to influence in determining whether all the proper parties were before the court.

The bill alleges that the land had been sold under a *ieri factas*, upon a judgment in favor of the

**CHANCERY.**  
**CASE 69.**  
**April 20.**

Who are necessary parties to a bill by vendor to enforce an equitable lien on land conveyed by him, and afterwards conveyed by him to others, and sold by execution against vendee



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Bank of Kentucky against Crocket, and was purchased by Hawkins, who is made a defendant. It also alleges, that the conveyance from Crockett to Hunt, was a contrivance to defraud the appellant and other creditors of Crockett, and that, when it was made, Hunt had notice of the equitable lien.

In his answer, Hawkins disclaims title, and says that he purchased the land under execution, as the agent of the Bank, and for her benefit.

Hunt, in his answer, denies the imputed fraud, and avers that the conveyance to him was made bona fide, and for a full and valuable consideration; and there is no proof tending to shew that it was merely colorable, and designed to defraud the creditors of Crockett.

He also alleges that the Bank of Kentucky had released to him all her claim to the land—but no release has been exhibited.

If, as charged in the bill, the mortgage to Hunt had been fraudulent and void as to Crockett's creditors, and the Bank was a judgment creditor, the land was subject to sale under her execution.

As there is no proof of fraud, the mortgage should be deemed (as between Clark and Hunt) to have been made for a valuable consideration, and without any fraudulent intent. And therefore, if Hunt holds, *as Hunt says he does*, all the interest of the Bank, she is not a necessary party, because, all her interest in the land, and in the event of this suit, was extinguished by her release to him. And in that view of the case, the release by the Bank to Hunt, would be of no avail to him against Clark's pre-existing lien, if he had notice of that lien, at the date of his mortgage, for, as the legal title was vested in him prior to the sale under the execution, it did not pass to Hawkins or to the Bank, in consequence of that sale, unless the mortgage had been relinquished, and therefore void as to the Bank; and Hunt, having denied that there was any fraud, is estopped from claiming any advantage which might have resulted to the Bank from the allegation of fraud, if she had never released to him, and had been a party to this suit. *He cannot, therefore, com-*

plain that the Bank is not a party, and, as between him and Clark, she is not, according to the allegations of the bill and answer, a necessary party. CLARK  
vs.  
HUNT.

But Hunt's answer is no proof against the Bank, that she had released her interest to him. As the Bank would not be concluded by any decree which could be rendered between the pre-ent parties on the facts exhibited by the record, as it now stands, if the land should be sold to enforce Clark's lien, a purchaser under the decree might be disturbed by the claim of the Bank—if she could shew, as she might do, notwithstanding the decree, or any thing which the record now contains, that any available interest, as against Clark, had passed to her in consequence of the sale under her execution—and had never been released to Hunt, then, is it not the duty of the court to require that the Bank be made a party, before any final decree be rendered, concluding the merits of the controversy, so that, in the event of a sale of the land for Clark's benefit, a purchaser may be assured that he buys a perfect and unincumbered legal title, and may not be liable to any claim which the Bank of Kentucky might ever be able to assert? We think it is; and that, as the facts now appear, Clark had no right to insist on a decree subjecting the land to sale for his benefit, until, by making the Bank a party, he had shewn that all the title which he conveyed to Crocket, could be assured to any person who might become the purchaser under the decree.

Wherefore, without intimating what our opinion now is on the merits of the case, so far as they now appear, it is decreed and ordered, that the former opinion and mandate be revoked and held for nought—that the decree of the circuit court, dismissing the bill absolutely be reversed. and that the cause be remanded with instructions to allow reasonable time for the Bank of Kentucky to be made a party.

*Crittenden*, for appellant; *Wickliffe*, *Wooley* and *Morehead*, for appellee.

**The Commonwealth vs. Bailey,**

Case 70.

Error to the Bourbon Circuit; FRENCH, Judge.

*Challenge, peremptory. Commonwealth.*

April 20.

Judge NICHOLAS delivered the opinion of the Court.

On an indictment against a tavern keeper for permitting unlawful gaming in his house, the Commonwealth has no right of peremptory challenge to venire men.

THE only question presented in this case is, whether under an indictment against a tavern keeper, for permitting unlawful gaming in his house, the Commonwealth has any right of peremptory challenge, to the venire men. The circuit court decided that she had not, and we think correctly. The case of Montee vs. Commonwealth, III J. J. Marshall, 149, to which we have been referred, does not determine the existence of any such right. The 18th section of the act of 1796, I. Dig. 408, declares in substance, that in no inquest on the part of the Commonwealth, shall she be allowed a peremptory challenge.

Judgment affirmed.

*Morehead, Attorney General, for Commonwealth.***Ferril vs. Combs.**

CHANCERY.

Case 71.

Error to the Clarke Circuit; FRENCH, Judge.

*Lands of non-residents. Lien. Jurisdiction. Publication. Nisi decree.*

April 23.

Chief Justice ROBERTSON delivered the Opinion of the Court.

COMBS filed a bill in chancery against Ferril, for enforcing an equitable lien on a tract of land, in Clarke county, which he had sold to Ferril, but had not conveyed, and for which a part of the consideration remained (as he alleged,) due and unpaid. An amended bill, prayed for the subjection also, of another tract of land, in the same county, owned by Ferril, but upon which Combs held no lien.

Upon a certificate of publication against Ferril, as a nonresident, the circuit court made a nisi interlocutory decree, for the payment of a certain sum of money, by Ferril to Combs, on or before the first day of the next term of that court.

The record states that, at the next term, the parties appeared. by their attorneys, and "*argued and submitted the cause for a decree:*" whereupon the court decreed the sale, first of the land sold by Combs to Ferril, and then of the other tract mentioned in the amended bill.

If the last decree had been interlocutory merely, there would have been no error in so much of it as applied to the equitable lien; to that extent the chancellor had jurisdiction *in rem*, independently of any statutory authority; and though the certificate of publication, (the order not being attached to it,) does not prove that *the order made by the court* had been published, nevertheless, the subsequent appearance and submission of the case for a decree, must be deemed a waiver of the right to file an answer, and therefore, at that term, the original bill might have been taken for confessed: but then, as the interlocutory decree was premature and irregular, for want of sufficient proof of constructive service, the decree rendered after the appearance, should have given day for the payment of the money, and not having done so is erroneous.

The circuit court had no authority to decree the sale of the land mentioned in the amended bill. As there was no lien on that tract, the court had not, so far as that was concerned, any other jurisdiction than that conferred by an act of 1827; Session acts, 158. According to that act, no decree was proper, unless Combs had sworn to the allegations of his bill; had averred that Ferril had not sufficient personal estate, within the jurisdiction of the court, to satisfy his demand; had proved the allegations of his bill, and had filed a bond for indemnifying Ferril; and none of these prerequisites to a decree, subjecting the land, appeared in this case.

Wherefore, the decree of the circuit court is reversed, and the cause is remanded for such further proceedings and decree as shall be right and proper, according to this opinion.

*Hanson*, for plaintiff.

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vs.  
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Chancellor has jurisdiction *in rem*, independently of any statute, to subject the land of a non-resident debtor to the satisfaction of the equitable lien for the payment of the purchase money for the land. Certificate of publication to which the order is not attached, does not prove that *the order made by the court* has been published and is therefore insufficient proof of constructive service of process. On a bill by vendor to enforce his lien on land for the payment of the purchase money, the omission to give a day (by interlocutory decree) for the payment of the money is error.

## MILL CASE.

Case 72.

## Hamilton vs. Adams.

Error to the Oldham county court.

*Mills. Record. Error.*

April 23.

Judge UNDERWOOD, delivered the Opinion of the Court.

Applicant for leave to erect a mill dam where he owns the land on one side of the stream only, must own the bed of the stream or the title to it must be in the Commonwealth. Record of the county court must show that applicant for erection of a mill dam has such title to the land on which the dam is proposed to be erected as the law requires him to have.

THE Legislature have thought proper to restrict the privilege of erecting mill dams and dams for other water works, to those who own the land on one or both sides of the stream where it is proposed to erect the dam. The applicant for leave to erect a mill dam, must likewise own the bed of the stream, where he owns the land on one side only, or the title to it must be in the Commonwealth. The record of the county court must show that the applicant had such title as authorized the erection of the dam, and if it do not it is error. Hamilton was summoned to show cause against the erection of the dam, the inquest returned having stated that he would sustain a trifling injury. He appeared and objected to the erection of the dam, because Adams had no title. The court, notwithstanding his objections, gave leave to erect the dam, without requiring Adams to exhibit any title. In this the court erred. If Adams failed to exhibit a title in fee, as required by law, his application should have been rejected. It is stated in the order granting the writ of *ad quod damnum*, that Adams was the owner of the lands on both sides of the run on which it was proposed to erect the dam. But as this order was *ex parte*, and made before Hamilton was summoned to show cause, it could not include him. Upon his appearance he had a right to call in question the title of Adams. This he did, and it seems the court, without investigating the title, gave leave to build the dam. For this cause the order and judgment of the county court, granting leave to erect the mill dam, is reversed and set aside, and the cause is remanded for new proceedings, upon the inquest already before the county court. If it shall appear that Adams hath title to the lands on both sides of the stream, the county court will then give leave to erect the dam. Should this be the conclusion of the court, they should state in the order granting leave to erect the dam, that it was proved, that Adams had title in fee to the lands on both sides of the

stream. If their opinion is again excepted to, they should cause the title papers to be incorporated in the bill of exceptions, together with all other evidence given by either of the parties.

WISEMAN'S  
HEIRS  
vs.  
REID.

Hamilton must recover his costs in this court.

*Monroe*, for plaintiff; *Crittenden*, for defendant.

## Wiseman's Heirs vs. Reid.

CHANCERY.

Error to the Garrard Circuit; BRIDGES, Judge.

Case 73.

*Vendor. Lien.*

Judge NICHOLAS delivered the opinion of the Court.

April 20.

REID sold to Wiseman a tract of land, and assigned to him the bond of Hendricks for the title. A balance of the purchase money remained due and unpaid, and being unable to make it out of the administrator of Wiseman, he filed his bill against the widow and heirs of Wiseman, and the heirs of Hendricks, in order to obtain satisfaction by a sale of the land. The circuit court decreed the relief sought.

It is objected on the part of the plaintiff in error, that Reid had no lien on the land for the purchase money. We think otherwise. We can perceive no reason for the principle which allows the vendor a lien on the land for the purchase money, where he conveys by deed, that does not equally apply to this case, nor can we discern the sufficiency of the objections urged against its allowance.

Person who holds merely a title bond for the conveyance of land and sells the land and assigns the title bond, retains a lien on the land for the payment of the purchase money in same manner and to same extent as if he had conveyed the land by deed.

We do not deem it necessary to notice the other assignments of error in detail; but will only observe, that the proof is abundant to show the mistake in not excepting in the assignment of the bond, the twenty three acres sold to Robert Reid; that, the widow of Wiseman has an important interest in the land sought to be subjected to sale, and that therefore she was a necessary party; that the personal representatives of Hendricks were not necessary parties; that from the record as now amended, all the proper parties appear to have been regularly before the court; that the decree, though, not as precise in

MYERS, &c. its discription of the land to be sold, nor as formal  
 vs. in other respects, as it might have been, yet it is  
 BUFORD, &c. substantially good and no way prejudicial to the  
 rights of the plaintiffs in error.

Decree affirmed with costs.

Turner, for plaintiffs; Breck and Caperton, for defendants.

jm 250  
10 134 EJECTMENT.

## Myers &c. vs. Buford &c.

CASE 74.

Error to the Lincoln Circuit; BRIDGES, Judge.

*Attornment. Limitation, statute of. Seven years limitation.*

April 23.

Judge NICHOLAS, delivered the opinion of the court.

THIS was an action of ejectment, brought by the plaintiffs in error, wherein Buford was admitted to defend with the tenants in possession, and on the trial, a verdict and judgment were rendered in favor of the defendants.

Person who entered and holds land by executory contract and lease or one, cannot, by giving him notice that he disclaims to hold any longer under him, and that he has purchased of and will hereafter hold under another, thereby stop the statute of limitation from running against the claim under which he thus attempts to shield himself

After the exhibition of a patent to the plaintiffs, and of another to Buford, of later date, for the land in contest, testimony was given, conducing to shew that Woodson, one of the defendants, who had entered under Buford, whilst holding under Buford by executory contract and lease, disclaimed Buford's title, notified him of his intention no longer to hold under him, and that he had or would purchase from and hold under the plaintiffs: that he accordingly did, by executory contract, agree to purchase from and hold under them, has ever since claimed to hold under them, but never surrendered to Buford the possession originally acquired under him.

The plaintiffs moved the court to instruct the jury, in substance, that the statute of limitations ceased to run against them, from the time Woodson agreed to purchase from and claimed to hold under them, and that he was estopped to deny their title. The court refused to instruct the jury as asked, and we think properly.

If the contest had been exclusively between the plaintiffs and Woodson, the instruction might have been given, but as against Buford, defending a possession originally acquired under him, it could not. It is contended, on the part of the plaintiffs, that Woodson's purchase from, and claiming to hold under them, accompanied with a disclaimer of Buford's title, destroyed the adversary character of his possession, and was equivalent to an actual entry by them. This effect could be given to his acts, only by construing his possession as their possession, which could not be done but by admitting a valid attornment from him to them. This we cannot concede. The case falls completely within the statute, avoiding the attornments from tenants to strangers. To allow the validity of this attornment would take from the statute all its efficacy. His disclaiming to hold under Buford's title, and notice of his intention to purchase and hold under plaintiffs, did not authorize him to transfer the possession, so as to make its subsequent continuance enure to the benefit of plaintiffs, and prejudice of Buford's title. To have enabled him to do so, he should have first surrendered to Buford the possession acquired from him.

MYERS, &c.  
vs.  
BUFORD, &c.

from the  
rightful au-  
thority of his  
landlord.

The court, at the instance of the defendants, in substance, instructed the jury, that continued *occupancy* by the defendants for seven years, would bar the plaintiffs. This instruction was improperly, and, as we suppose, inadvertently worded, so as not to require that the occupancy should have been acquired, and held by actual *settlement* on the land. See *Smith vs. Nowells*, 2 Litt. 160.

Seven years  
occupancy to  
constitute a  
bar, must  
have been ac-  
quired and  
held by actu-  
al settlement.

There is a similar inaccuracy in the instruction given, to bring the case within the first section of the act of 1809. The jury should have been required to believe, that Bunch settled on the land, *having* title deducible of record from the Commonwealth, instead of "*claiming* title by matter of record," &c. as the instruction is worded.

The plaintiffs moved the court for leave to dismiss their suit as to Buford, which the court refused to permit. This also is assigned for error. We think Buford was clearly entitled to be made a de-



WILLIAMSON  
VS.  
BOUCHER.

defendant, and if so, we cannot perceive with what propriety it can be contended that the court should have allowed plaintiffs to dismiss their suit as to him.

We can see no greater force in the objection, that the judgment for costs is rendered against the lessors of the plaintiff.

The objection as to the validity of Buford's patent, is completely answered by the case of Woodson vs. Buford, 7 Monroe.

For the errors, alluded to, in the instructions given at the instance of the defendants, the judgment must be reversed, and the cause remanded for further proceedings.

*Owsley*, for plaintiffs; *Crittenden*, *Haggin* and *Monros*, for defendants.

TRAVERSE.

## Williamson vs. Boucher.

Case 75.

Error to the Bracken Circuit; ROBER, Judge.

*Forcible entry. Traverse. Irregularity.*

April 24.

Chief Justice ROBERTSON, delivered the Opinion of the Court.

In this case, the circuit court, on a traverse to an inquisition finding the traverser guilty of a forcible entry, charged in a warrant against him, quashed the warrant and set aside the proceedings in the country, on the motion of the traverser, after issue had been made up on the truth of the inquisition. The only reason assigned or perceived for such a judgment, by the circuit court, is, that the time for holding the inquisition was left blank in the warrant, and that it was held on the first of March, although the warrant directed the officer to hold it some time in February.

After a traverse to the circuit court on an inquisition of forcible entry, it is too late to object to any irregularity in the

As the party, against whom the warrant had been issued, appeared before the justice and traversed the truth of the inquisition, he could not take advantage, afterwards, of any prior irregularity: all such irregularity in the preparatory proceedings was waived by the traverse to the circuit court. It was, therefore, too late (after the traverse, and

especially after an issue as to its truth or falsehood had been concluded,) to object to any irregularity in the warrant, even if any such appeared; II. Bibb, 431; III. Monroe, 363; IV. Bibb, 501; I. J. J. Marshall, 45.

WITHERS  
vs  
CURD et al.  
warrant or  
other preparatory  
proceedings.

Judgment reversed, and cause remanded for further proceedings.

*Morehead and Brown*, for plaintiff; *Crittenden*, for defendant.

### Withers vs. Curd et al.

Error to the Jessamine Circuit: KELLEY, Judge.

*Special bail. Petition and Summons.*

MOTION.

Case 76.

Chief Justice ROBERTSON delivered the Opinion of the Court.

April 24.

WITHERS, having sued J. B. Curd by petition and summons, procured from a justice of the peace, upon affidavit, an order requiring special bail; Willis Curd and others entered into a recognizance as special bail; and, on their motion, the circuit court quashed their recognizance because, in the opinion of that court, the requisition of bail, in such a case, was illegal.

We concur with the circuit court.

Prior to the abolition of the *ca sa* in 1821, special bail was required by law in certain actions of debt, and in covenant and detinue, and might have been required by order of a judge upon a proper affidavit of the plaintiff, in other actions in which a *capias ad respondendum*, issued for arresting the defendant.

But a defendant, in a petition and summons, could not have been held to bail upon affidavit or otherwise, by any requisition of a common law judge. As the summons did not authorize an arrest, the plaintiff, by electing that mode of action, waived his legal right to require special bail.

The second section of the act of 1821, (1st Digit. 503) declares, that special bail shall not be required, in any case, without a prescribed affidavit. That statute cannot be construed as extending the pre-existent right of requiring bail, or as giving it in a pe-

On petition and summons the defendant cannot be compelled to give special bail.

**WILLS et al.** titution and summons, in which there can be no arrest,  
**vs.** - and in which no special bail could have been required  
**SALE.** according to any law in force prior to 1821. The  
 act is restrictive and negative in its object and effect.

Judgment affirmed.

*Hewitt*, for plaintiff; *Owsley*, for defendant.

**DEBT.**

### **Mills et al. vs. Sale.**

**Case 77.**

Error to the Jefferson Circuit; **PIRTLE**, Judge.

*Suit against heirs. Declaration.*

**April 24.**

Judge **UNDERWOOD** delivered the opinion of the court.

In suit against heirs, after judgment has been obtained against the executor or administrator, the declaration must shew that proper steps have been taken against the executor or administrator, and that they have resulted "in a judgment of record or a return of the proper officer," manifesting a want of property of the deceased in the hands of his personal representative to satisfy the debt.

THE only question in this case is, did the circuit court err in sustaining the demurrer to the declaration? The appellants instituted an action of debt against Sale and others, as heirs of Charles Scoggin, for the purpose of collecting from them the amount of a judgment which the declaration avers had been obtained against the said Charles in his life time. After setting forth the judgment against Scoggin, the declaration avers that it was "revived against Marius Hanstrough, the administrator, and yet remains unpaid and unsatisfied. Nevertheless, said defendants, or either of them, the said debt, or any part thereof, to the said plaintiff have not paid, &c."

The proceedings, on the part of the appellants, were evidently intended to subject the heirs to the payment of the debt of their ancestor, under the provisions of the act of 1819, (1 Dig. 652.) It is our opinion that the averments of the declaration are not sufficient to bring the case of the appellants within the operation of that statute. The statute does not allow the institution of suit against the heirs, after judgment has been obtained against the executor or administrator, upon the contract of the ancestor, unless "it shall appear by a judgment of record, or by the return of the proper officer, that there is not property of the deceased in the hands of the executor or administrator to satisfy the judgment." The declaration in this case does not aver that there was no property of the deceased in

the hands of Hansbrough, the administrator, to satisfy the judgment; and that such appeared to be the fact from a judgment of record, or by the return of the proper officer. The statement that the judgment against the administrator remained "*unpaid and unsatisfied*," is not sufficient. That may be true, and yet there may be property enough in the hands of the administrator with which to pay it. No execution may have been taken out against him. Before the heirs can be rendered liable, the declaration must shew that proper steps have been taken against the executor or administrator, and that they have resulted "in a judgment of record or a return of the proper officer," manifesting a want of property of the deceased in the hands of his personal representative to satisfy the debt. This has not been done. The judgment of the court upon the demurrer, is therefore affirmed with costs.

*Denny, for appellant.*

CROUCH  
vs.  
BRILES.

### Crouch vs. Briles.

Error to the Washington Circuit; KELLEY, Judge.

ASSUMPSIT.  
Case 78.

*Assumpsit for use and occupation.*

Judge UNDERWOOD delivered the opinion of the court.

April 24.

CROUCH sued Briles in assumpsit. The declaration contains four counts. Demurrers to each were sustained by the court. The questions for consideration relate to the sufficiency of the counts.

The first count, in substance, avers that the plaintiff, Crouch, rented to the defendant, Briles, a smith's shop in Springfield, and put the defendant in possession thereof as the plaintiff's tenant from year to year. In consideration whereof, the defendant undertook and promised to pay the plaintiff for the use, occupation and rent, of said shop, the sum of \$30 a year in Commonwealth's paper, at the end of the year. The plaintiff averred a continuation of the possession in the defendant, under this agreement, for five years, during which time he used and enjoyed the premises.

CROUCH  
VS.  
BRILES.

The second count avers, in substance, that the plaintiff, at the special request of the defendant, permitted him to use, occupy and enjoy, another smith's shop in Springfield, and put him in possession thereof, as a tenant from year to year. In consideration whereof, the defendant promised to pay the plaintiff for the use and occupation aforesaid, at the end of each year, so much money as he, the plaintiff, reasonably deserved to have therefor. It is then averred, that the defendant's possession continued five years, and that the plaintiff reasonably deserved to have, for the use and occupation, \$30 yearly, amounting in the whole to \$150, of which the defendant had due notice, and thereupon promised to pay, &c.

The third count states, that the plaintiff, at the special request of the defendant, on the 11th April, 1825, did verbally lease, rent and demise, to the defendant for one year another smith's shop in Springfield, and did then and there put the defendant in possession thereof. In consideration whereof, the defendant then and there promised to pay the plaintiff therefor \$30 in Commonwealth's paper, to be discharged in blacksmith's work during or at the end of the term.

The fourth count states, that on the 11th April, 1830, the defendant having before that time entered and enjoyed the shop, as stated in the third count, and also having held, used and occupied said shop for a long time: to wit, from the 11th April, 1826, to the       day of       did, in consideration of holding over, occupying and enjoying said shop, promise to pay the plaintiff for such holding over, &c. so much money as the same was worth, whenever thereafter he should be thereunto requested. This count concludes by averring that the holding over, &c. was worth \$120, of which the defendant had due notice.

The non-performance of the promises contained in the several counts, is sufficiently and in apt form alleged. The plaintiff is entitled to recover, if the assumpsit, as set out in any of his counts, shews a good cause of action. The judgment should at least have been for him upon the demurrer to such count.

It is contended that the several counts are bad, because the promises they contain are parol and not written, and therefore come within the operation of the statute of frauds. This objection to the declaration cannot prevail. The case of *Kibby vs. Chitwood's admr's*, IV. Monroe, 91, is a complete answer to it. There may be written evidence in support of each count, signed by the defendant, and yet such writings may not constitute a valid foundation upon which to sustain an action of covenant, under the operation of the act of 1812, raising unsealed writings to the grade of sealed instruments. The question whether the statute of frauds applies, cannot, therefore, be considered upon demurrer. As, therefore, each count sets out a promise founded upon sufficient consideration, we are of opinion that the demurrers should have been overruled.

It is possible that the circuit court may have acted upon the opinion, that assumpsit for the use and occupation of lands, cannot be maintained upon the principles of the common law; and that this consideration, together with the belief that the statute of frauds applied, influenced the decisions upon the several demurrers. Such an idea, if entertained, is certainly erroneous. Where a man takes possession, uses and occupies land as tenant under another, the common law raises an *assumpsit* to pay for the use and occupation. This position is fully sustained by the cases of *Roberts vs. Tennel*, III. Monroe 253, and *Eppe's ex'rs. vs. Cole and ux.* Hen. IV. and Mun. 161. In the last case, Judge Tucker reviews the English adjudications on the subject, and shews satisfactorily, that the action for use and occupation is of common law, and not statutory, origin.

Where a person takes possession, uses and occupies land, as tenant under another, the common law raises an *assumpsit* to pay for the use and occupation. The action for use and occupation is of common law, and not of statutory, origin.

Wherefore, the judgment of the circuit court is reversed, and the cause remanded, with instructions to overrule the demurrer to each count, and for such other proceedings as are not inconsistent with this opinion, and may be necessary to decide the cause on its merits. The defendant must be allowed to withdraw his demurrers, and plead if he asks leave to do so.

WEST  
vs.  
HART &c.

The plaintiff in error must recover his costs in this court.

*M. D. McHenry*, for plaintiff.

COVENANT.

## West vs. Hart, &c.

Case 79.

Error to the Mason Circuit; ROPER, Judge.

*Lease, covenant in. Covenant to keep in repair.*

April 24.

Judge NICHOLAS delivered the opinion of the court.

Covenant "to keep the farm and buildings in good repair and leave them in the same good order at the end of said term of three years," does not bind the tenant, either to put or leave the premises in better repair than they were at date of the covenant.

THIS case depends upon the construction to be given to the following covenant in a lease: "To keep the farm and buildings in good repair, and leave them in the same good order, at the end of said term of three years."

It is contended in behalf of plaintiff in error, that this covenant bound the defendants to put the farm and buildings in good repair, and to leave them in actual good repair at the end of the lease, without reference to their condition at the date of the lease. We have been referred to the case of *Brashear vs. Chandler*, VI. Mop. 150, as ruling this to be the true construction: That case is not like this. There, the covenant was, to *deliver* the farm, at the end of the lease, *in good tenantable repair in every respect*, and it was properly construed into a stipulation for putting the farm into repair, whatever its situation might have been when rented. It is said in that case, that, a covenant simply to repair, may be construed to embrace only the making good what may be damaged, *ad interim*, but that the stipulation to deliver in good repair in *every respect*, left no room for limiting it into a covenant merely to repair, according to the original condition of the farm. The word *keep*, seems to us, to have direct reference to the condition of the premises at the time of the lease, and that the then state of repair must be taken to be, what the parties meant by good repair. There is so broad and palpable a distinction, between a promise, to *put* into repair, and one to *keep* in repair, that it is almost impossible to believe the parties meant the former, when they used the latter expression. A covenant to *keep in repair*, is certain-

ly no broader than a covenant to *repair*, and if the latter obliges only to make good the damage *ad interim*, no greater stress can be laid on the promise to keep in repair. BRANSOM  
VS.  
BACON *et al.*

The last clause "*to leave in the same good order,*" gives no aid to the construction, one way or the other. Its obvious meaning is, that the premises were to be *left* as they had to be *kept*.

The court below gave the same construction to the covenant that we have done. Wherefore, judgment affirmed with costs.

*Triplett and Hord*, for plaintiff; *Morsehead and Brown*, for defendants.

### Bransom vs. Bacon *et al.*

Error to the Franklin Circuit; TODD, Judge.

*Distress. Execution laws.*

Judge NICHOLAS delivered the opinion of the court.

IN an action of trespass *de bonis asportatis*, brought by the plaintiff against the defendants in error, it was proved that M'Quiddy, as constable, by direction of Bacon, under a distress warrant in favor of Bacon, against Bransom, seized and carried away, among other things, all Bransom's beds and bedding, and the wearing apparel of his wife and children, which were of the household and domestic manufacture of the wife.

The court, at the instance of the defendants, instructed the jury, that all the statutes, prior to the acts of 1826, exempting certain property from sale under execution or distress warrant, had been repealed by that act, so far as related to distress for rent, and that no property was exempted by that act from seizure and sale by distress for rent, and therefore all the property mentioned was subject to the warrant, and the defendants were justifiable in taking it.

After an attentive examination of the act referred to, we have found nothing whatever to authorize the interpretation given to it by the circuit court.

TRESPASS.

Case 80.

April 24.



**PRICE et al.** It is true, that, it is entitled "an act, to reduce into one the execution laws of the state;" that, a proviso in its 13th section enumerates certain articles of property that shall be exempt from execution; that it repeals all acts coming within its purview; but, these features, cannot be considered as producing the effect imputed to the act. It no where prescribes the mode of proceeding under distress for rent, and it could with equal, if not greater propriety, be construed to repeal all laws authorizing the collection of rent by distress. There is in truth no just ground for either construction. In most if not all our legislation, the rules of proceeding under execution, and under distress warrants have been kept separate and distinct, and the two subjects legislated upon apart from each other. The acts of 1815, and 1820, I. Digest 498, so far as they exempt certain property from distress, are still in force, and no way repealed by either the letter or spirit of the general execution act of 1828.

Statutes of 1815 and 20, which exempt certain property from distress, have not been repealed by the execution law of 1828.

For the error committed by the court in the instruction given to the jury, the judgment is reversed, and cause remanded for further proceedings, consistent with this opinion.

Plaintiff in error to recover costs.

*Monroe and Sanders*, for plaintiff; *Richardson*, for defendants.

CHANCERY.

## Price et al. vs. Meredith.

CASE 81.

Error to the Warren Circuit; BRODNAX, Judge.

### Usury.

April 25.

Chief Justice ROBERTSON delivered the opinion of the court.

Vide case.

JOHNSON, as assignee of Price, having obtained a judgment against Meredith, on a note for \$700 in Commonwealth paper, Meredith and his replevin sureties enjoined the judgment for alleged usurious exactions prior to the date of the note, which was a continuation of a series of notes of different amounts, which, during that and the preceding year, had been given by Meredith to Price.

On the final hearing, the circuit court perpetuated the injunction to the entire judgment; and the appellants now complain that the circuit court erred in not dissolving the injunction for some part of the judgment.

PRICE *et al.*  
v.  
MEREDITH.

The case was loosely prepared, and it is impossible to ascertain with satisfactory certainty, from the bills, answers, and proofs, what would be the precise state of case between the parties, if it could be adjusted, by any certain data, according to the principles of equity. Enough, however, is disclosed to prove that outrageous exactions of interest have been made by Price of Meredith, amounting, sometimes, to as much as five per cent. a month.

The answers of Price, (especially the first) are replete with evasions and misrepresentations. But the exact amounts and dates of all the various loans do not appear. And putting upon all the facts a construction the most unfavorable to Price, this court cannot, without venturing upon the vaguest kind of guessing, conclude with the circuit court, that Meredith owes nothing.

After scrutinizing all the facts, and analysing every circumstance that can operate *legitimately*, or furnish any *rational* clue, we are of opinion that about \$110 (in Commonwealth paper) at least, were due to Price, at the date of the note sued on. We are not authorized to determine, *judicially*, that he was entitled to less or to nothing, and we are willing to say that, according to such an interpretation of the facts *as his own conduct will justify*, he was not entitled to more. As the facts are minute and voluminous, we will not unnecessarily swell this opinion by advertising to them.

The assignment to Johnson was evidently merely colorable.

The contract was for Commonwealth notes, and the execution was endorsed for such notes. Therefore the circuit court ought, in our opinion, to have dissolved the injunction for \$110, and the legal interest thereon, for which the judgment was rendered.

VALLAN-  
DINGHAM  
v.  
DUVAL &c.

Wherefore, the decree is reversed and the cause remanded, with instructions to render a decree conformable to this opinion.

The appellants must have their costs in this court, but should pay costs in the circuit court.

*Jas. and Chs. Morehead*, for appellants; *Ewing*, for appellees.

ASSUMPSIT.

## Vallandingham vs. Duval, &c.

Case 82.

Error to the Muhlenburg Circuit; M'LEAN, Judge.

*Pleas. Partners. Assumpsit.*

April 25.

Chief Justice ROBERTSON delivered the Opinion of the Court.

THE only question presented in this case is, whether, in an action of assumpsit against partners, a plea by *one* of them, averring that *they* did not assume within five years prior to the institution of the suit is a good defence?

Each defendant, in such a suit as well as in any other, against a plurality of persons, has a right to sever in pleading and may, of course, plead any matter which may bar or abate the action as to himself; and, as no one partner is under any legal obligation to pay, or contribute to the payment of a partnership debt barred by time, the statute of limitations must be an available defence for each or for all of them.

To a joint declaration against partners, a plea by *one*, that *they* did not assume within five years prior to the institution of the suit, is a good plea.

When one partner pleads the statute of limitations in bar of a joint suit against all the partners, he should aver that *the partners* did not assume within five years; as the plea does not deny the partnership, nor the joint assumpsit as charged in the declaration, it would not be good if it averred only that *the party* filing it had not assumed within five years, because an assumpsit, within that time, by any one of the copartners, might be the assumpsit of all, and might be obligatory on all of them; and a plea that one of them had not assumed within five years, would not be responsive to the declaration. Therefore, as one of the plaintiffs in error (sued as partners) pleaded that *they* had not assumed within five years next preceding the impetration of the writ,

the circuit court erred in sustaining a demurrer to **HOPKINS**  
his plea.

**SMITH et al.**

It would be preinature now to decide whether, if the plea be sustained, the whole action would be defeated, or whether it would be barred only as to the partner pleading the statute. That question does not arise on the demurrer to the plea, because the plea is a legal defence to the action by the partner who filed it, whether it may exonerate himself only, or may bar the whole action.

Judgment reversed, and cause remanded with instructions to overrule the demurrer.

*M Henry*, for plaintiffs.

### Hopkins vs. Smith *et al.*

**TROVER.**

Error to the Montgomery Circuit; **ROBBINS**, Judge.

Case 83.

*Evidence. Witness. Levy. Plaintiff in execution.*

Chief Justice **ROBERTSON** delivered the opinion of the court.

April 26.

THIS was an action of trover, brought by the defendants in error, against the plaintiff, for some cattle sold by a constable under execution, in favor of the plaintiff against one Garret, for whose wife the defendants, as her trustees, claimed the cattle.

The jury found a verdict for \$15 in damages, and the court refused to award a new trial.

Whether there was sufficient proof to show that the plaintiff in the action had a legal right to the cattle, we shall not now consider. For if there was, Garret, the husband of the *cestui que trust*, was not a competent witness for the trustees, and therefore the circuit court, in that view of the case, erred in deciding that he was competent, and if there was not sufficient proof of the title of the trustees to the cattle sued for by them, the verdict could not be sustained; and, in either event, the judgment would be erroneous; and whatever may be the effect of the proof, as to the title of the trustees, we are of opinion that there was not sufficient proof of a conversion by the plaintiff in error. As creditor in the

In trover by trustee of wife, for conversion of trust property of wife, the husband is not a competent witness for trustees.

DAVIS  
vs.  
TIBBATS *et al*

Plaintiff in execution is not liable for illegal levy of officer, unless he directed or was instrumental in the levy.

execution, he was not liable for conversion by the constable, unless he had, in some way, been instrumental in the sale of the cattle. The only fact, tending in any degree to show any such agency, is that, when he delivered the execution to the constable, the plaintiff said, "levy it on *Garret's cattle*." There is no proof that he directed the levy to be made on the cattle which were levied on by the constable, or that he advised or sanctioned the levy as made, or intended to direct a levy on any other cattle than such as belonged to *Garret*: there is not even any proof that *Garret* was in the possession of the cattle levied on, at the time the instruction was given by the plaintiff, or that he had no other cattle.

Wherefore, the judgment is reversed, and the cause remanded for a new trial, which the circuit court erred in refusing to award, on the motion of the plaintiff in error.

*Jas. Trimble*, for plaintiff.

COVENANT.

### Davis vs. Tibbats *et al*.

Case 84.

Error to the Fayette circuit; HICKEY, Judge.

*Indemnity, bond of. Sheriff.*

April 26.

Chief Justice ROBERTSON delivered the Opinion of the Court.

THIS is an action of covenant instituted by James E. Davis, against Thomas Tibbats and Charles Humphreys, on the following covenant.

"Know all men by these presents, that we, Thomas Tibbats and Charles Humphreys, are held and firmly bound unto Robert Russel, sheriff of Fayette county, and James E. Davis, D. S. for R. Russel S. F. C. in the just and full sum of \$500," &c. &c. (dated 7th June 1819.)

"The condition of the above obligation is such, that whereas T. Tibbats recovered judgment in the Fayette circuit court, against Chs. Edwards for \$131 82½ &c. &c. and whereas the said Tibbats issued an execution on said judgment, which execution was duly received by James E. Davis, D. S. for said Russel, and levied on the household and Kitchen

furniture of said Edwards, and said Davis, D. S. <sup>DAVIS</sup>  
 advertised the same for sale on the 7th of June, <sup>VS.</sup> TIBBATS et al  
 1819, now if the said T. Tibbats and Charles Humphreys shall well and truly indemnify and save harmless the said R. Russel, S. F. C. and the said James E. Davis, D. S. from all suits, damages, and costs to be recovered and sustained in consequence of said levy and sale, and pay the same as soon as they shall be recovered against said Russel or Davis, as sheriff or otherwise, then the above obligation to be void, else to remain in full force and virtue."

THOMAS TIBBATS, SEAL.

CH. HUMPHREYS, SEAL.

The declaration avers that Davis, in consequence of the foregoing covenant for his indemnity, sold the property therein referred to, and that, afterwards, Combs and Shrieve, (strangers to the execution) who claimed the property as belonging to them, and not to Edwards, sued him (Davis) in trover and conversion, and recovered a judgment for \$406 damages and \$37 2 cts costs.

The circuit court sustained a demurrer to the declaration.

We cannot perceive any sufficient reason for sustaining the demurrer, unless the covenant be deemed illegal, or unless it was necessary that Russel should have united as co-plaintiff in the action. But neither of these positions can be maintained.

1st. There is nothing in the condition or consideration of the covenant incompatible with public policy, or good morals, or any statutory provision, or any principle of the common law. If the property on which the execution had been levied was not subject to sale, the officer was not bound to sell it; and had a moral as well as legal right to require from the creditor an indemnity. It is true that the sale of the property by the officer, was an unlawful act; and it is also true, as a general proposition, that if either the undertaking of a party, or the consideration therefor, be unlawful, the contract is void according to the principles of the common law. But <sup>A bond of indemnity given to a sheriff for</sup> a promise to indemnify a sheriff for taking property under a fieri facias, not subject to the writ, has been

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taking prop-  
erty (under  
a fi. fa.)  
which was  
not subject to  
the writ, may  
be valid.

excepted from the operation of the general rule, and may therefore be valid; Cro. Ja. 652. This exception is the more reasonable when the sheriff acted in good faith without a knowledge of the fact that the property was not liable.

According to the established construction of a statute of this state, it is the duty of a sheriff, if indemnified, to sell property, even after a jury empanelled to try the right, shall have decided that it is not subject to sale under the fieri facias which he had levied upon it. Then why may he not take a bond of indemnity for selling property which had never been ascertained not to be liable, but which in fact, was not liable? Justice and sound policy require that such bonds, when in other respects fair and legal, should be valid; and hence they have been declared to be so.

2d. Although there are two covenantees the covenant to each is several, and Davis alone has a right to complain of the breach charged in the declaration. Russel has sustained no loss or damage whatever, and would have no right to sue on the covenant.

Wherefore, as the declaration contains averments sufficient to maintain the action, the circuit court erred in sustaining the demurrer to it.

Judgment reversed and cause remanded with instructions to overrule the demurrer.

*Brown and Morehead*, for plaintiff; *Chinn and Haggin*, for defendants.

TRESPASS.

## Sodusky vs. McGee.

Case 85.

Error to the Jessamine Circuit; KELLEY, Judge.

*Evidence. Confession.*

April 26.

Chief Justice ROBERTSON delivered the opinion of the Court.

JOHN McGee sued John Johnson, James Sodusky, and several others, for an assault and battery. On the trial, as there was no proof that all the persons jointly sued had actually assaulted or beaten the defendant in error, the court permitted

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McGee to prove by one Singleton, that he (the witness) "after the fight, heard James Sodusky and John Johnson talking—Sodusky said he came there to whip the d——d rascal—and Johnson said it *was a plot to do so.*"

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The plaintiff in error then moved the following instruction—"that the confession or statement of one of the defendants, Johnson, is not evidence against *any* of his co-defendants—to prove a *conspiracy between them*"—But the motion was overruled, and we think, improperly.

If a combination had been proved, an acknowledgment, by any one of the confederates, of any *fact* concerning the trespass, would have been admissible evidence against all of his associates. But a declaration or confession by one, is not competent to prove that others had been combined with him. The admission of such testimony, for such a purpose, would be inconsistent with the first principles of proof in courts of justice. The confession of one defendant cannot prove that a co-defendant had aided or abetted him in the perpetration of an imputed wrong. *Johnson did not even state who had made the "plot."*

The confession of one defendant, in an action of assault and battery, is not evidence against a co-defendant.

The declaration made by Johnson, was legitimate evidence against himself and James Sodusky with whom he was conversing, and who did not deny the "plot;" and therefore, if the instruction, as proposed, could be construed to import only that Johnson's statement was not legal evidence against *any one* of the defendants, there would have been no error in refusing to give it.

But it means more: The expressions—"is not evidence against any of his co-defendants to prove a confederacy between *them*" must be understood to mean that Johnson's statement was not admissible to prove a confederacy by *the defendants*, that is, all the defendants in the action. And, consequently, the circuit court erred in not giving the instruction. (See *Metcalfe vs. Conner*, Sel. ca. 497-8.)

All the other points embraced in the assignment of errors, have been hitherto virtually settled between the present plaintiffs in error, and other par-



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ties, and will not, therefore, be now again noticed. The error which has been noticed is the only one perceived in this record, and was not presented in any one of the former cases to which allusion has been made.

Wherefore, for the error of the circuit court in refusing to give the instruction proposed as to Johnson's statement, the judgment must be reversed, and the cause remanded for a new trial.

*Chinn and Sanders*, for plaintiff; *Hewitt*, for defendant.

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Case 86.

April 26.

### Williams vs. Hudson et ux.

Error to the Green Circuit; MONROE, Judge.

*Misjoinder. Husband and wife.*

Judge NICHOLAS delivered the opinion of the Court.

THIS was an action of trespass brought by Hudson and wife, in which, after a trial on the general issue, they obtained a verdict and judgment.

The assignment of errors questions the sufficiency of the declaration. The first and second counts are for an assault and battery of the wife. The third is, that the defendant did, with feet, hands, clubs, &c. and with force, seize, take and carry away from out of the possession of plaintiff, money, one thousand dollars, the property of the plaintiff, which he still keeps, &c.

In trespass by husband and wife, declaration contains two counts, one for an assault and battery of the wife, and one *de bonis asportatis* "the property of the plaintiff," and verdict for plaintiffs, ob-

The objection is, that there is a misjoinder of causes of action; that the declaration contains a cause of action in favor of the husband alone, together with one in favor of the husband and wife. The declaration is undoubtedly defective, if it be liable to this objection.

It is contended, that the wife's possession, is the husband's possession. That the wife cannot have a joint property with her husband in money, which is in the possession of either. That the third count contains no charge of an assault on the wife, or any allegation that would admit proof of an assault. That it is merely a count for taking and carrying

away money, the whole or a part of which must be considered as belonging exclusively to the husband. WILLIAMS  
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al.

On the other hand, it is insisted, that the wife could have no constructive possession of money belonging to the husband, and therefore it must be held, that the money was in her actual possession, within her corporal touch; and an assault on her person necessarily inferred to have happened in the seizing, taking and carrying it away, and that after verdict, we should infer that damages was given for the assault alone. jected that there was a misjoinder of causes of action, that is one in favour of the husband and wife, and one in favor of the husband alone, decided that, as the husband and wife might, before coverture, have had a joint right to the goods taken, the court will (to sustain the verdict, presume that the taking was before coverture, and therefore the cause of action joint.

The basis of both these arguments, it will be perceived, is, that it must be taken, that the money was exclusively the property of the husband. Our reflections have led us to a different conclusion; and we shall not, therefore, stop to inquire into the relative merit of the two arguments, based, as we conceive them both to be, upon an erroneous assumption of fact.

The money was not necessarily the exclusive property of the husband. The wife might have had a joint property with him in it, and a joint right of action for the taking and carrying it away. They could have had a joint property in it before coverture; and in the absence of allegation to the contrary, we feel bound, in support of the verdict, to presume that the taking and carrying away occurred before coverture, which would give a clear joint right of action after the marriage. In this opinion, we feel strongly fortified, by an authority we have met with, in a note to Evans' edition of Salkeld, pa. 114, which is this. In replevin by baron and feme for taking their goods, after avowry for rent, non *demisit* pleaded in bar to the avowry and verdict for plaintiffs; it was excepted in arrest of judgment that they could not join. Lord Hardwicke said, the exception stands on this foundation, that husband and wife cannot have a joint property in chattels, and in general that is true, because marriage is a gift of all the chattels to the husband; but in this case it does not appear that the taking was during the coverture, nor can we presume it was. The plaintiffs, for ought that appears, might be jointly pos-

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essed of these goods before marriage, and if that was the case, and they were taken before marriage, they might, after coverture, join in the replevin, and declare for taking the goods of husband and wife; and if there can be such case, we must take it to be so here, because the avowry allows a property in them both.

Judgment affirmed with damages and costs.

*Monroe and Brents*, for plaintiff; *Morehead and Brown*, for defendants.

# EJECTMENT.

## Nesbit vs. Gregory.

Case 87.

Error to the Bourbon Circuit; FRENCH, Judge.

*Deed made by a commissioner. Statutory deeds.*

April 27.

Chief Justice ROBERTSON, delivered the opinion of the Court.

THIS is an action of ejectment in which it will be necessary to consider only two questions. 1st. Did the circuit court err in permitting the lessor of the plaintiff to read on the trial a deed made to him, in the names of the guarraantee's heirs, by a commissioner, under a decree rendered in a suit in chancery against the said heirs as non-residents? 2nd. Was there error in the refusal of the court to instruct the jury to disregard a paper marked A, referred to in a deposition read by the defendant in the action, plaintiff here, and which he moved the court to exclude, or to instruct the jury to disregard, because it was, in his opinion, irrelevant and was introduced by the lessor on cross examination of the witness?

Deed made by a commissioner conveying the title of non-resident heirs to land is not void, altho' the decree under which it was made, did not allow the heirs time to make the

1. The deed was objected to as inoperative and therefore irrelevant for two reasons—1st. because the decree under which it was made has not allowed the heirs time to make it in their own proper persons—2nd, because the deed was not executed by the commissioner, in his own name, but the names of the heirs, instead of his own name, had been subscribed to it by him. The first objection to the deed would be formidable in a direct proceeding for reversing the decree. But it cannot prevail when made, as in this case, incidentally or collaterally

It may shew that the decree was erroneous, but it does not prove that the decree was void. If the parties were properly before the court, the chancellor had jurisdiction, and his decree, however premature or irregular, is not void. A statutory deed will be ineffectual, unless it be made in the manner prescribed by the statute—such, for example, is a deed made by commissioners appointed by a county court. In such a case, the county court acts ministerially—its only power is derived from the statute, and therefore its acts will be void if they be not conformable to the requisitions of the statute. But the deed, in this case, is not a statutory conveyance. The chancellor had jurisdiction, independently of any statute, to compel the holders of the legal title to convey it. The statute only authorized the substitution of a commissioner on a certain contingency. The power of the chancellor to coerce a conveyance, being original and judicial, his decree cannot be void merely, because, in the exercise of that power, he has taken hold of statutory aid, irregularly or prematurely. Such irregularity or precipitancy might be sufficient for reversing the decree, but nevertheless, until reversed, it must be deemed valid, if the heirs were regularly in court when it was rendered: and we cannot presume that they were not before the court by regular constructive service of process, but should rather presume the contrary, as the whole record, in the chancery suit, has not been exhibited.

2. The other objection to the deed is novel if not fatal. It presents a point which has never been directly decided by this court. Shall a commissioner subscribe his own name, or that of the party for whom he acts? What is the question now raised? Our answer is that the validity of such a judicial conveyance does not depend *essentially* on the mode of signing it. It is the decree directing the conveyance, and afterwards approving of it, which gives legal operation and effect to it. If the commissioner subscribe his own name to the deed, he does it for the party whose title is conveyed, and the decree, directing the conveyance will then pass the title. If the commissioner subscribe the name of the party holding the title, will not the decree give the con-

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deed in their  
own proper  
persons.

A statutory  
deed is ineffectual, unless  
made in the  
manner pre-  
scribed by the  
statute.

A deed made  
by commis-  
sioners ap-  
pointed by a  
county court,  
is a statutory  
deed.

Deed made  
by a commis-  
sioner under a  
decree, is val-  
id, whether  
he subscribe  
to it his own  
name, as com-  
missioner, or  
that of the  
title whose  
title he con-  
veys.

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veyance all the effect which the signature of the party himself could have imparted to it? In each form of conveyance the commissioner acts merely as the instrument of the court, and agent of the party; and a conveyance in either form, is a conveyance by the party of all his right, as long as the decree shall stand. The decree directs the commissioner to convey the title of the party—and whether he puts his own name or that of the party to the deed, he does, by his conveyance, in execution of his delegated power, transfer all the right which the court, by its decree, could transfer—and conveys the title of the party, and for the party, as far as the court had power to pass it.

But the demise was laid on the first of September, 1828, and the deed was not made until November the 25th, 1828. Wherefore, as the deed did not tend to show title at the date of the demise, it was inadmissible evidence.

Irrelevant paper should be excluded from the jury.

II. The circuit court erred in not excluding paper A from the jury. Its relevance cannot be perceived. It was introduced by the lessor—and the only proper mode of avoiding any effect which it might have had on the jury, was that adopted by the plaintiff in error—that is, to move the court to exclude it, and to instruct the jury to disregard so much of the deposition as related to it.

Wherefore, the judgment is reversed, and the cause remanded for a new trial.

*John Trimble, for plaintiff; Brown, defendant.*

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## Bank of the Commonwealth vs. Ray &c.

Case 88.

Error to the Breckenridge Circuit; M'LEAN, Judge.

### *Renewal of notes in Bank.*

April 24.

Judge NICHOLAS delivered the opinion of the court.

THE Bank sued Ray, Hascall, and Basham, on a note executed by them to the Bank, as sureties, with Absalom Carr as principal.

It appeared in evidence, that after the falling due of this note, a note signed by Hascall and one John

Carr, and purporting to be signed by Ray, was presented at Bank, to take up the note sued on, that it was received and the note sued on marked in the books of the bank as renewed by the other. In a suit brought by the bank on the second note, it was abated as to John Carr, the defendant Ray discharged on the plea of *non est factum*, and judgment by default taken against Hascall, on which execution was issued, and part of the money made. On this state of case, the plaintiffs moved the court to instruct the jury:

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That if they believed from the evidence, that the note discounted in lieu of the note sued on, was a forgery as to any of the sureties, and that any of them were discharged under the plea of *non est factum*, it was no payment, and they must find for the plaintiffs.

This instruction the court refused to give, but at the instance of the defendants, gave the following:

If the jury believe, from the evidence, that after the note sued on was given, the bank received said second note, as a renewal of the first, in payment thereof, and after they were notified the second note was a forgery as to Ray, obtained judgment against Hascall, issued a *fi. fa.* thereon, and made part of the money, they must find for the defendants.

As a renewal of a prior note there is executed to be a second note which includes one new obligor, and drops two of the original obligors, on this second note, after notice that it was a forgery, the bank brings suit, obtains judgment against one of the obligors, issues execution and makes part of the money, decided, that the bank could not thereafter recover in a suit on the original note.

A verdict and judgment were rendered in favor of the defendants, and the bank now alleges error in the giving and refusal of said instructions.

We have been referred to the case of the Bank vs. Letcher, III. J. J. Mar. 195, as proving the error complained of. That case is wholly unlike this. There the note given in renewal, was or purported to have been executed, by all the parties to the first note and none other. Here there is not only a new party to the second note, two of the original parties dropped, but suit is brought, and after notice of the forgery, judgment taken, execution issued, and part of the money made out of one of the parties to the second. The two cases have scarcely a feature in common. Which, if any of the various circumstances enumerated in this case, would singly amount

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to a discharge of the note sued on, we will not say; but, taking them all together, we have no hesitation in saying that they amounted to a payment and discharge of the first note.

Wherefore, judgment is affirmed.

Crittenden, for plaintiffs.

## Coyle's devisees vs. Morton.

Case 89.

Error to the Fayette Circuit; HICKLY Judge.

### *Abatement. Devisees.*

Appl 27.

Judge NICHOLAS delivered the opinion of the court.

In an action against devisees the suit may, upon the return of *no inhabitant* as to one, be abated as to him and judgment taken against the others.

THE only question presented in this case, is, whether in an action against devisees, upon the return of *no inhabitant* as to one, the suit can be abated as to him, and judgment taken against the others.

It is said that in several of the circuits, an abatement in such cases is not allowed. If so it is singular that the question should not have long ago been presented here for adjudication, for it is believed that the opposite practice has long obtained in much the greater number of the circuit courts. In fact it has prevailed so long and to such an extent, that we should feel great hesitation in disturbing it, even if we were satisfied, that it was originally wrong. But we consider it right in itself, and in perfect accordance with the principles settled in the case of *Sneed vs. Weister*, II. Mar. 277. In that case it was determined in favor of a practice that had long beneficially prevailed, that in an action of assumpsit on a parol contract, the suit might abate as to one of the defendants on the return of *no inhabitant*, and that the act allowing the abatement in the case of joint obligors, was only declaratory of the pre-existing law. We can perceive no distinction, so far as regards this matter, between a joint obligation imposed by operation of law on heirs or devisees, and a joint obligation arising from a parol contract. All the arguments upon which the decision in *Sneed vs. Wiester* is based, apply as well to the one as to the other. The arguments *ab inconvenienti*,

which were principally relied upon in that case, and <sup>SHARP</sup> must have mainly influenced its decision, apply <sup>VS.</sup> with precisely the same force to the case of heirs TROVER et al. and devisees. We might hesitate to innovate a rule upon arguments of that sort alone, without precedent or any long acquiesced in practice to support it. But we feel no doubt in following a precedent and a practice, founded in such good sense and sound policy, and extending its principles, if it be at all necessary to give them extension, so as to embrace this and all analogous cases.

Wherefore, judgment is affirmed.

*Cowan and Morehead*, for plaintiffs; *Chinn*, for defendants.

### Sharp vs. Trover et al.

MOTION

Error to the Christian Circuit; SHACKLEFORD, Judge.

CASE 90.

*Motion. Execution, failure to return. Constable. Ten per cent. damages.*

Chief Justice ROBERTSON, delivered the opinion of the Court. April 29.

ABSALOM M. SHARP moved against Trover, a constable, and others his sureties, for the statutory penalty for a failure by the constable to return, within twenty days from the return day, a fieri facias, which he had received to execute, in favor of Sharp, and against one Stubblefield.

On the hearing of the motion, the constable and his sureties proved that Stubblefield, (who was a tenant of one Baily) being indebted to Sharp, was prevailed on by him to subdivide the debt into six separate notes, each for a sum within the jurisdiction of a justice of the peace, and to confess judgments upon them, and consent that executions might be issued and levied on his property, which was liable to a distress by his landlord; that in the absence of the landlord's agent, the property might be sold and should be bought by Sharp for his (Stubblefield's) benefit, and that Sharp should receive from Stubblefield replevin bonds or promissory notes, at any time within twelve months in discharge of his judgments.



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They also proved that Sharp advised Stubblefield that such an arrangement would secure to him his property, which, otherwise, would be distrained by his landlord, as soon as his agent, then in an adjoining county, should return; and that, accordingly, the judgments were confessed, executions issued and levied, and the property sold, all on the same day; that the property was, at Sharp's instance, bought by one Patton, who, in consequence of the arrangement between the parties to the executions, left it all in Stubblefield's possession, and was exonerated from paying the price, or any part of the price which he bid for it; in lieu of which it was agreed between all the parties, that if Stubblefield should pay the amount of the judgments in bonds at any time within twelve months, the property should remain his, but that if he should fail thus to satisfy the judgments, Sharp should hold the property.

It was also proved that the constable was privy to the foregoing arrangement, and was told by Sharp that he was not expected or required to make any money upon the executions.

The executions were not returned until a day or two after the expiration of twenty days from the return day. And thereupon, before the expiration of twelve months from the sale, Sharp made six several motions against the constable and his sureties, for the purpose of making them pay the whole amount of his six executions, and ten per cent. thereon. The circuit court, after hearing all the proof on both sides, dismissed all the motions; and the parties having agreed that a decision, by this court, of one of the cases, shall conclude all the others, this writ of error is prosecuted by Sharp in one of them. In considering this case, we shall not further notice any of the others.

The act of 1812, I. Dig. 297, Sec. 12, which authorizes a motion against a constable for failing to return an execution within a prescribed time, was enacted for the security and indemnity of *bona fide* creditors, by stimulating constables to a faithful discharge of their official duty, lest their wilful delinquencies or negligent delays may subject those, for whom they act, to actual inconvenience and damage.

But the statute would be perverted and made an instrument of oppression and fraud, were it to be applied indiscriminately and inexorably to all cases in which a constable may have failed to return an execution within the prescribed limitation.

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In a motion allowed by the statute the recovery cannot be graduated according to the actual damage, nor can it be limited as it might be in a common law suit, on the official bond; to nominal damages for a mere technical breach of official duty, which may have occasioned no actual loss; but it must be for the whole penalty denounced by the law; and therefore, whenever an enforcement of the whole penalty would be inconsistent with the end and policy of the law, there should be no recovery at all upon motion. For example—if an execution creditor shall have received his debt, either before or after the return of his execution, or if the execution shall have been satisfied by a sale of property to the creditor, surely he should not be permitted to coerce from the constable and his sureties the amount of the execution and the ten per cent. damages for a failure to return it within the time prescribed by the statute. Of this there can be no doubt.

If the plaintiff in an execution has received his debt, either before or after the return of the execution, or if the execution has been satisfied by a sale of property to the plaintiff himself, he cannot thereafter recover by motion, against the constable and his sureties, the amount of the execution and ten per cent. damages for a failure to return it within the time prescribed by law.

If Sharp acted in good faith, his execution was satisfied, or should be deemed to have been satisfied, by the sale of Stubblefield's property, and the purchase of it by his agent, Patton, at his instance and for his benefit: for it was clearly proved that it was agreed between all the parties, that Patton should not be responsible for the price which he bid for the property, but that it should remain with Stubblefield for one year, and should be absolutely his, if, within that time, he paid Sharp the amount of the executions in notes or bonds, but that, otherwise, it should be Sharp's. In this aspect of the transaction, no other execution could have been rightfully issued by Sharp, and he could neither have been, benefitted by a prompt return nor injured by a tardy return of the process that had been thus virtually satisfied.

Hence, if the ostensible acts of the parties exhibit their actual intentions, there can be no doubt that

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Sharp cannot have a right, moral or legal, to a judgment against the defendants for his original debt or for one cent. But if the sale was a trick or device intended to embarrass or frustrate the lien of Stubblefield's landlord, or was merely colorable, Sharp trifled with the law and with its executive officer, and was endeavoring to use them, not for the open, direct, and lawful purpose of making, by fair and legal means, his own debt, but as instruments in the accomplishment of ends which they should never subserve or countenance.

If this be the proper construction of the transaction, the constable, acquainted with the facts and with the intentions of the parties, would have acted properly if he had refused altogether to play any part in such a farce; and he would not have been obnoxious to legal reprehension, if he had withdrawn and refused to sell or levy; and he should not have been liable to the penalty now sought, for failing to return process which Sharp was endeavoring to misapply.

Shall a desperate debt be permitted to be extorted by such dexterity and indirection, from the sureties of an officer, whose only fault was a failure to return, within the exact time prescribed by law, an execution which had been satisfied by the acts and directions of the creditor, or which, if it had not been thus satisfied, had been sported with by him, and diverted from its legitimate use. We think not. Skill shall not be thus rewarded, nor ignorance thus punished.

We approve the judgment of the circuit court as just and right, as dictated by sound policy, and perfectly accordant with pure morality and positive law.

Wherefore the judgment is affirmed.

*Monroe*, for plaintiff; *Morsehead*, for defendant.

**Philips vs. Morris.****REPLEVIN.**

Error to the Anderson Circuit: Todd, Judge.

**Case 91.***Replevin, action of. Avowry. Equity of redemption, sale of.*

Chief Justice ROBERTSON, delivered the Opinion of the Court. April 28.

THIS is an action of replevin brought by Morris vs. Philips, for sundry articles of goods and chattels taken by the latter, and claimed by the former.

In three several forms Philips avowed the taking, and justified under a fieri facias in his hands, as constable, issued against one Chewning.

In the first avowry he alleged that Chewning was the owner of the property when the execution was levied. In the second he averred that the property was in Chewning's possession *and was subject to the execution*, and in the third he averred that Chewning had mortgaged the property to Morris, but had an equity of redemption, wherefore he (Philips) levied the execution on the equity of redemption, and took the property into his possession for the purpose of selling the equity.

Demurrers to the second and third avowries were sustained by the court. It seems that an issue was concluded on the first avowry, but in what form we cannot ascertain from the record. The parties then agreed that either might prove any thing which could have been pleaded, and thereupon went to trial. The court instructed the jury to find for Morris, and a verdict and judgment were accordingly rendered in his favor.

Although the case seems to have been tried on the merits in consequence of the agreement of the parties; yet, as it does not appear, that the matter pleaded in the third avowry was brought before the jury, and as we should presume (in the absence of record evidence to the contrary,) that Philips was not permitted to prove any such matter after the court, on demurrer, had decided that it was unavailing, it becomes material to decide on the sufficiency of the 3d avowry. The demurrer was properly sustained to the 2nd, because it did not state any fact from which

In replevin, avowry by defendant that as constable he had an execution in his hands

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against the mortgagor of the property in contest, that he levied it upon the equity of redemption and took the property into his possession for the purpose of selling the equity, held to be good. When an officer levies on the mortgagor's equity of redemption in mortgaged property, he has the right to take the property into his possession for the purpose of effecting the sale.

the court could, as a matter of law, infer that Chewning was the owner of the property. Some substantive, fact and not a mere deduction, was necessary to show that the right was in Chewning.

But the third avowry is, in our opinion, good. If, as it alleges Chewning held an equity of redemption, the officers had a right to levy on the property and sell that equity. Having a right to sell, he had a right, of course, to exhibit the property at the sale, so that bidders might see what they were buying; See I. Dig. 505. He had, therefore, a right to take the property into his possession, and the mortgagee had no right, so far, to complain. His right could not have been materially or injuriously affected by the sale of the mortgagor's equity of redemption, and is carefully protected by the law which subjects the equity to sale. Such sale could not be effected unless the officer had a right to take the property.

Wherefore, the judgment of the said court is reversed, the verdict set aside, and the cause remanded, with instructions to overrule the demurrer to the third count in the avowry.

*Monroe*, for plaintiff; *Richardson*, for defendant.

## Griffin vs. Hedrick.

Case 92.

Error to the Pulaski Circuit; BRIDGES, Judge.

### *Promise.*

April 28.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Evidence of conversion does not prove a contract to return.

WE are of opinion that the evidence in this cause does not establish a contract of any kind between the plaintiff and defendant. It may shew that Griffin converted a clock owned by Hedrick, but it does not conduce to prove a promise to restore the clock upon demand. The court therefore, erred in entertaining jurisdiction of the cause: without any instruction to the jury, it would have been proper for the court to dismiss the whole proceedings for want of jurisdiction; II. J. J. Marshall's Reports, 29.

Judgment reversed, and cause remanded for a new trial.

**Carswell's Ex'r. vs. Renick & Wood.**

DEBT.

Error to the Franklin Circuit; MAYES, Judge.

**Bond. Delivery, conditional. Escrow. Nil tiel record.** Case 93.  
**Pleadings.**7m 281  
109 537

Chief Justice ROBERTSON delivered the opinion of the Court.

Judge Nicholas did not sit in this case

April 30.

SAMUEL CARSWELL, as relator, sued Stanley P. Gower, as principal, and Alexander H. Renick and John Wood, as his sureties in debt, on a jailer's official bond, purporting to be, and declared on, as being the bond only of the parties sued. The defendants, Rennick and Wood, pleaded that the bond sued on had been delivered by them to the clerk of the county court, as an escrow, to be binding on them whenever Oliver G. Waggener should also sign and acknowledge it—that Waggener never did become a party to the bond—and that, therefore, it was not *their deed*, (concluding to the country.) The plaintiff, instead of taking issue on the plea by a similiter—replied specially (after traversing the affirmative allegation) that the bond described in the declaration *had been acknowledged in the county court of Franklin by all the defendants unconditionally, as by the record of said court would appear.*

To this the defendants, Rennick and Wood, rejoined, that there was no such record—and issue having been concluded on that rejoinder, the circuit court decided it in favor of the defendants, and thereupon, gave judgment in bar of the action, so far as Wood and Rennick were concerned. Whether or not the court erred in the judgment thus rendered, is the only question we shall now consider.

The plea is good in substance. It is not material now to enquire whether the bond could have been binding unless it had been acknowledged in the county court—for even if it be, it might have been delivered to the clerk as an escrow—a conditional delivery to the clerk was not necessarily an effectual delivery to the obligee; nor is the fact that the relator made profert of a copy, even *prima facie* proof of an absolute delivery of the original.

As an absolute delivery was indispensable to the legal obligation of the bond, and as the plea averred

To debt on constable's bond, plea by two of the sureties that the bond was delivered as an escrow, to be binding when executed by another, a good plea.

CARSWELL'S  
EX'ORS vs  
RENNICK &  
WOOD

Absolute delivery of bond essential to its legal obligation. Plea averring a fact that shews there had been no such delivery is equivalent to the general issue, and may conclude to the country. Plea admitting such delivery, but setting up extraneous matter in bar, must conclude with a verification.

a fact, shewing, if it be true, that there was no such delivery, it was not necessary to conclude with a verification. The plea, in legal effect, may be deemed the general issue. If an absolute delivery in fact had been made, or had been admitted, a plea averring any *extraneous fact*, such as coverture or duress, for the purpose of shewing that the delivery was not binding in law, ought to have concluded with a verification, because, as upon an issue of *non est factum*, pleaded in any form, the plaintiff could not be required, in the first instance, to prove any thing more than an absolute delivery of the bond, if such delivery in fact had been admitted by the plea, he would not have been bound to prove any thing, until the defendant had proved some special matter in avoidance; and therefore, as the onus would have devolved on the defendant in such a case, his special plea should have concluded with a verification.

But when, as in this case, the fact pleaded shews that there had not been an unconditional delivery in fact, the plea may conclude to the country, because, in such a case, the plaintiff may be required to prove an actual and unconditional delivery—and therefore, the defendant may throw the onus on the plaintiff, by concluding to the country—and when such a plea thus concludes, its only effect is to circumscribe the proof, and confine it to the fact specially announced in the plea. (See the form of such a plea in II. vol Chitty on Pleading—and see also *Watts vs. Roswell*, I. Salkeld, 274.)

If the plaintiff take issue upon plea of delivery of bond sued on, as an escrow, or on condition, he may prove absolute delivery, at any time prior to impetration of the writ. If he reply matter *de hors*, the plea by which to estop the par-

If the plaintiff had concluded an issue on the plea, he would have had a right to prove an absolute delivery of the bond described in the declaration, at any time prior to the date of the writ. But when he attempted to avoid the effect of the fact pleaded by departing from the plea, and averring an acknowledgment of the bond in court, whereby the parties were estopped, he virtually admitted, that unless there had been such an acknowledgment, the bond had been delivered only as an escrow, as averred in the plea. Nul tiel record was therefore a material and proper issue. And as the plaintiff staked his case on that point, he has no right to complain of the judgment upon it, unless he sustained his alle-

gation. As the issue imposed the onus upon him, and as he chose to bring it to a single and isolated point—towit, that the bond sued on had been acknowledged in court, it was proper that he failed in the suit if he failed to sustain his affirmative allegation, and to shew that the bond, of which oyer was given, was the same which had been acknowledged in court.

We are of opinion that the bond described in the declaration, and that described in the order of the county court, cannot be deemed (judicially) the same. The first purports to be a bond executed by Gower, Rennick and Wood only—the other is described by the record, as the obligation of the same three persons, and also of O. G. Waggener—the date of the former is April the 21st, 1818, that of the latter is December, 1818. Dates may not be essential—but they are material on the question of identity.

Wherefore, the two obligations seem to be different—and therefore the judgment of the circuit court appears to be right, and must be affirmed.

*Brown*, for plaintiff; *Crittenden* and *Monroe*, for defendants.

*NAPIER and wife*  
— vs. —  
*DAVIS et al.*  
ties pleading, he stakes his case upon the allegation, and judgment must be rendered against him, if it be not sustained.

## Napier and wife vs. Davis et al.

CHANCERY.

Error to the Todd Circuit; BRIDGEMAN, Judge.

Case 94.

*Devise. Limitation. Widow. Heirs. Whole and half blood. Statutes of Tennessee. County Court. Distribution.*

Chief Justice ROBERTSON delivered the Opinion of the Court. April 30.

In the year 1810, John M. Lowther, resident in Montgomery county, Tennessee, made and published the following will, which was, in the same year, duly proved and admitted to record in the Court of Probate, in the said county—

“I, John M. Lowther, of Montgomery county, and state of Tennessee, do hereby ordain, &c. 1st. I give to my beloved wife Nancy Lowther, one moiety or half of negroes Sull, Tilly, and Peter, together with all my household furniture (except one bed and furniture,) my farming utensils, and my stock of



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cattle, hogs and sheep, and my sorrel mare and her two fillies. And also my plantation and land during her widowhood. 2. I give to (my) son, William Lewis, my land and plantation after his mother's death, or termination of her widowhood, and my negro boy Charles. 3. I give to my daughter Minerva one moiety, or one half of my negroes Sall, Tilly, and Peter, a bed and furniture, and a horse, bridle and saddle, when she arrives to maturity—which horse, bridle and saddle, is to be made or come out of the property I have given my wife Nancy, and which horse, bridle and saddle, shall be worth one hundred dollars. My cotton gin, the surplus bacon, if any, the board of James Blanks and Pallas Cooper, to appropriate to payment of just debts. My sorrel horse shall be sold to the best advantage for cash, which shall be appropriated to the use of my wife, until the maturity of my son William Lewis, when she shall make or give to him a horse, saddle and bridle, worth one hundred dollars. My wife is to and shall have my children educated out of the property given to her and them. In testimony, &c."

It seems that about four or five years after the death of J. M. Lowther, his widow was married to David Davis, by whom she had two children (the defendants in error)—that not long after the death of the second husband (Davis)—the wife surviving—William Lewis Lowther, one of the devisees, died (in Tennessee) intestate and childless, and before he had attained twenty one years of age; that, afterwards, Nancy Davis, (the former widow of J. M. Lowther) removed to Kentucky—where she died intestate, in the year 1823; and that the plaintiffs in error—Thomas Napier and his wife (Minerva one of the devisees) intermarried when she was only about fourteen years old, and had acquired the possession of Tilly prior to the death of Mrs. Davis, who retained the possession of the other slaves and their issue until her death. And all of whom were retained by the administrator upon her estate until August, 1828, when the county court of Todd county, made an order directing the administrator to deliver them to Napier and wife.

To enjoin the order of the county court (which appears to have been *ex parte*) and to obtain partition of the slaves, the defendants in error (the children of Mrs. Davis by her last marriage) filed a bill in chancery against Napier and wife, and other persons, who held the slaves on hire from the administrator. After stating the foregoing facts, the bill alleged that Mrs. Davis, for herself and the defendants in error, had, prior to 1822, made an amicable partition of the slaves with Napier and wife, and had delivered to them, in consequence thereof, Charles and George—that afterwards, sometime in the year 1822, she (Mrs. Davis) purchased all the right of Napier and wife in the slaves, Charles and George at a sale under a *fiery facias* in her favor against Napier.

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The answer of Napier and wife denied the alleged partition with Mrs. Davis, and preferred large claims for hire since the marriage with Davis, whereby, (as they insisted) all her right, as devisee, expired. The answer was made a cross-bill. *An amended bill* was filed, insisting that the devise by J. M. Lowther to his wife was (*with the exception of the land*) unlimited.

Neither the cross bill nor amended bill was answered. The circuit court decreed that Napier and wife were entitled to one half of all the slaves except Charles and George—to one ninth of Charles and to one third of George, both of whom were directed to be sold; and appointed a commissioner to make partition and sale accordingly. To reverse that decree, this writ of error is prosecuted with a supersedeas.

When Mrs. Napier attained twenty one years of age, and not until then (which was in 1828,) one moiety of all the slaves except Charles vested in her and her husband in consequence of the devise to her. Upon the death of her brother, he became entitled to only one third of Charles by the operation of the law of Tennessee, according to what we deem the true import of the statutes certified in this case as the law of that State, and the reading of which was not objected to by the plaintiffs. According to our interpretation of those statutes each of the defendants was entitled, as a sister of the half blood, to one

By the statutes of Tennessee brothers and sisters of half blood take equally with those of the full blood of deceased brothers or sister's estate, whether real or personal.

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*wife*  
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third, and Mrs. Napier, though sister of full blood, to only one third of the estate, real and personal, of their intestate brother. But the records and proceedings in Tennessee, in 1822, and which were read without objection, shew that all the interest of Napier (the husband) in Charles, was bought in 1822 by Mrs. Davis, under an execution which had been issued in her favor against him, and levid on Charles. We therefore suppose that, as the interest of the wife (one third) had vested absolutely in the husband, that interest passed to Mrs. Davis in consequence of the sheriff's sale—and was, after her death, distributable, according to the law of this state, (where she died) equally among her three daughters—and, of course, Napier and wife are entitled to only one ninth part of Charles.

Devise, by husband to wife of property, real and personal, "during her widowhood," forfeited upon the marriage of the widow, and property construed to pass to the heirs of the devisor, tho' no limitation over of personal property.

We are of opinion that the interest devised to the widow (afterwards Mrs. Davis) was forfeited by her subsequent marriage, and that, thereupon, Mrs. Napier and her brother, William Lewis, became entitled to the whole of it as the only legal distributees of their father. The will was not drawn with as much precision as is always desirable and important in such cases; and therefore the intention of the testator may be somewhat doubted. But taking the first clause of the will by itself and construing it according to the letter—the punctuation, the rules of grammar and of common sense, it should be interpreted, we think, as limiting her entire interest to her life or widowhood. The whole will, taken together, does not change the import of the isolated devise to the widow. There is nothing in any other part of the will which is inconsistent with our construction of that clause, or which tends to establish any other interpretation. On the contrary, we are inclined to the opinion, that the will, as a whole, tends to fortify our construction of the first clause, and, altogether, evinces a determination that the testator's wife should hold no part of his estate, as devisee, longer than she should live in widowhood. We deem it unnecessary to enter into a consideration of all the various reasons which might be urged for and against this conclusion. We are content with stating the result of a careful and thorough survey

which we have made of all the provisions of the will in all their hearings. The necessary consequence of this view of the case is, that, as Mrs. Napier was entitled, as devisee, to one half of George, and, as distributee first of her father, on her mother's marriage, to one fourth and next to one twelfth, as a distributee of her brother, ten twelfths had vested absolutely in her husband prior to the sale under the execution. That interest was transferred by that sale to Mrs. Davis—and was distributable, after her death, among her three children—consequently each of the defendants was entitled to one twelfth as a distributee of their half brother and each of them, as well as Napier and wife, is entitled to one third of a tenth, as distributees of their mother.

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wife

DAVIS et al.

The decree of the circuit court is therefore erroneous. The claim to hire seems to have been pretermitted; and the record, as it now stands, does not enable this court to decide upon it definitively. On the return of the cause, the parties may be permitted to litigate that, as well as all other matters growing out of the will, and which are not concluded by this opinion. The interest in the slaves will not, of course, be subject to further controversy. Ten twelfths of all, except Charles and George, belong to Napier and wife. Two twelfths to the defendants: and Charles and George (as the interests in them are indivisible) should be sold, and the proceeds distributed in the proportions settled by this opinion.

The order of the county court cannot, from any thing appearing in this record, be deemed conclusive as to the right to the slaves; and therefore we have considered the case as we should have done, if no such order had ever been made.

Order of  
county- court  
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liver over  
slaves to per-  
son claiming,  
not conclu-  
sive of the  
rights of par-  
ties.

And as to the sale of George by the sheriff, we have not deemed it necessary to decide whether the interest of Mrs. Napier to one moiety as devisee was, at that time, such as was subject to execution; for, in distributing the respective interests of the parties according to the principles of equity, we are of opinion that the sale should be regarded as passing the entire interest of the husband, as well that which

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was prospective as that which was certain and then in his actual possession and enjoyment, especially as we do not know that, by the law of Tennessee, the interest under the will was not liable to execution, before the devisee had attained twenty one years of age.

Chancellor will not subject defend-  
ant's estate in Kentucky to the satisfaction of judgments of another State, upon mere allegation of existence of such judgments unsatisfied; if judgment debtor complainant, he might be subjected to conditions before relief granted.

As to so much of the bill as prayed for a decree subjecting the interest of Napier and wife to the satisfaction of the Tennessee judgments, we shall only observe that, as Napier and wife were not complainants seeking the interposition of a court of equity, and therefore in an attitude which might have authorized a chancellor to exact from them equitable concessions as a condition to relief sought, no decree subjecting their estate in Kentucky to the judgments in Tennessee should be rendered without other allegations, and proof of other facts than any now appearing.

Decree reversed, and cause remanded, with leave to answer the cross and amended bills, and for such other proceedings as shall be proper and consistent with this opinion, if the parties shall elect to proceed further in litigating matters not concluded by the principles herein settled; but, otherwise, with instructions to enter a final decree between them upon the whole case as now presented, and according to the foregoing view of it by this court.

Cunningham and Monroe, for the plaintiffs; Morehead and Breathitt, for the defendants.

CHANCERY.

## Ligon vs. Alexander &c.

Case 95.

Error to the Owen circuit: HICKY, Judge.

*Vendor, vendee. Equitable lien. Remote assignee. Title bond for land. Statute.*

April 30.

Judge NICHOLAS delivered the opinion of the Court.

OGDEN having title, executed a bond for the conveyance of a piece of land to Ligon, who having paid therefor, assigned the bond to Morgan, who assigned it to Alexander, with notice of the non-payment of the purchase money due from Mor-

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gan to Ligon, and of the lien asserted by the latter on the land, for its payment.

Ligon filed his bill against Ogden, Morgan, and Alexander, asserting these facts, and praying relief by a sale of the land, for the satisfaction of the purchase money due him from Morgan. On demurrer his bill was dismissed in the circuit court.

So far as our researches have enabled us to ascertain, the decisions of this court furnish no precedent for a case exactly like this, and it must, therefore, be determined upon analogy alone. It was decided, at the present term, in the case of Reid vs. Wiseman's heirs, that a lien for the purchase money existed in favor of the assignor against the assignee of a title bond for land, whilst it remained in the hands of the assignee. In the case of Stewart vs. Hutton, III. J. J. Mar. 178, it was said that, where one sells an equitable right to land, held by entry and survey, he has a lien on it for the consideration, whenever, under the same circumstances, the vendor of the legal title would hold an equitable lien, and that the same reason and principle apply to both cases.

Still approving the doctrine as settled in those cases, we cannot perceive why it should not be made to embrace this, and affectuate a lien on the land in favor of an assignor against a remote assignee of the title bond, purchasing with notice.

The principle upon which the lien is created, is, that for the unpaid purchase money, the vendee is considered as a trustee of the estate for the vendor. So far as it relates to the abstract equity, upon which the lien was founded, it can make no difference whether the proprietorship of the land was evidenced or held by a legal or equitable title. That abstract equity is a right to make the land answerable to its vendor, for the price, for which it was sold.

There is no magic in the circumstance that the title sold was the legal title, or that it was transferred by absolute conveyance. The lien does not arise from, nor is it attached to, the deed of conveyance, but proceeds from the contract of sale, and is attached to the land. The vendee is construed to be,

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&c

Lien - Existence in favor of assignor vs. assignee of title bond for land whilst it remains with assignee, Reid vs. Wiseman's heirs, 7 J. J. M. Vendor of equitable right to land has a lien for the consideration, when ever vendor of legal right under similar circumstances would have an equitable lien. Stewart vs. Hutton. 3 J. J. M. 178.

Lien upon land for the purchase money, does not depend upon, whether the proprietorship is evidenced by legal or equitable title; it results from the right the vendor has, to make the land answerable for the price for which it was sold. Vendee is trustee to vendor of the estate, for the unpaid purchase money, and all per-

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&c

sons claiming under him, no matter how remote, who have notice of the trust, stand in his shoes. It matters not whether the first transfer be by assignment of a bond for a title, or by conveyance; or whether with or without covenant of warranty.

No assignor can have a lien upon land in the hands of assignee unless he have paid the purchase money to his vendor. The liens from first assignor to last assignee take precedence according to priority, as they would were the transfers all made by deed. Statute authorizing the assignment of bonds &c. does not operate upon the lien of assignor of bond for land; nor prevent his pursuing it in

and is clothed with the character of, a *quasi* trustee, and all persons claiming under him with notice of the trust, stand in his shoes. Where A conveys to B by deed, B sells to C by bond for conveyance, C having notice of A's lien for the purchase money, there would be no difficulty in enforcing the lien against C, or any successive number of persons claiming from him by assignment of the bond. There is no essential difference, as to the substance of the transaction, and there should be none made, where the first transfer is by an assignment of a bond for the conveyance. The lien depends in no degree whatever, upon the circumstance whether the vendor conveyed with or without covenant of warranty. It exists in his favor in either case.

It is objected that this extension of the lien, against a remote assignee, is calculated to produce a war of irreconcilable and conflicting liens. We cannot perceive how any such result is to ensue. Before any assignor can have such a lien, he must show himself to have been the beneficial owner of the property, by payment of the purchase money to his vendor. With this borne in mind, there can be no difficulty in reconciling any number of distinct liens from the first assignor to the last assignee of the bond. Each takes precedence according to his priority in point of time. The whole would be regulated in precisely the same manner, that it would where all the transfers were made by deed.

It is further objected that the holder or last assignee, can sue the obligor for not conveying, thereby rescind the contract, and convert the whole into a judgment for damages. Whether he could do so or not, so as to defeat the assignors lien, need not now be determined, for conceding that he could, that would not prevent the enforcement of the lien by a suit brought before the contract was rescinded. The same argument would equally prove that the vendor, by absolute conveyance, could have no lien against a remote vendee with notice, for the vendee would have an equal right to defeat the lien by sale and conveyance to one not having notice.

We do not perceive the application or bearing of the statute, which authorizes the transfer of the bond

by assignment. It merely authorizes this mode of transferring the equitable right to the land, and leaves the question wholly untouched, whether the assignor of such a right, has a lien, or whether he can follow it, into the hands of a remote assignee, purchasing with notice.

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&c.  
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the hands of  
remote assignee.

It is ever matter of some delicacy, to apply, even the best settled principles to new cases, and it should always be done with caution. This is the sole cause of any hesitancy in this case. We have endeavored carefully to explore all the ground over which this new application of the vendor's right of lien is to carry us. We can discern no obstacles in our path.

Wherefore, decree reversed, and cause remanded with directions to overrule the demurrer, and for further proceedings consistent herewith.

Plaintiff in error to recover costs.

Marshall, for plaintiff; Payne, for defendant.

Judge Underwood dissented from the foregoing decision of the court, and delivered the following opinion:

It so happens that I do not possess that clearness of vision which enables me to travel the path pointed out in the opinion just delivered without great apprehension of danger. I perceive obstacles, or fancy I do, which make it very difficult to get along with safety, in this new application of the right of lien in favor of the assignor of a bond for real estate, against a remote assignee.

Dissent.

I feel it to be my duty to express my dissent, entertaining at the same time great respect for the opinion of the majority of the Court.

If any lien exists in behalf of Ligon against Alexander, it is not the result of any express contract between them, but it arises from the facts detailed, by implication of law. According to the doctrines of the English books, when land is sold, and the purchaser becomes bankrupt, part of the purchase money not being paid, there is a natural equity that the land should stand charged with so much of the purchase money as was not paid, without any special agreement for that purpose; *Chapman vs. Tanner*, 1. Ver. 267. In the case referred to, the vendor re-



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tained "*some of the deeds in his hands*," and that circumstance was noticed in subsequent cases as of importance, in creating the lien. But in the progress of jurisprudence, such a circumstance was not deemed necessary to sustain the principle. The law became settled in England, that a vendor had a lien upon the land to secure the purchase money, where other security was not taken; and that this lien attached to the land against the vendee and all persons claiming under him with notice. See Fonblanque's Equity, 381, and authorities in note l. The same doctrine has been adopted in this state, and so repeatedly enforced, that it cannot now be disturbed. The question, however, in this case, is not, whether such a lien exists in behalf of the original vendor, who either retains the title, or has parted with it, taking no security for the purchase money; but it is, whether the assignor of a bond for land is entitled to it.

There is, to my mind, a wide difference between the condition of the original vendor and an assignor of the vendor's bond. This difference will manifest itself by considering the foundation upon which the lien rests in behalf of the original vendor. He is bound to make good the title. And so far as my knowledge extends, the doctrine of lien in his behalf, grew out of cases where he was bound to warranty. If the vendor agrees by executory contract, to convey without warranty, I know of no adjudged case where the chancellor has interposed to enforce a lien in his behalf. If the chancellor should be applied to for such a purpose, I should think it strange, were he not to require the vendor to show that he had a title, if it were questioned, before a sale was decreed. It would be a proceeding *in rem*, and the doctrine is, in such cases, that the chancellor will see that there is something to sell before sending out his commissioner.

Where the vendor has a title and warrants it, or even conveys without warranty, if he loses the purchase money, he is thereby impoverished. If he conveys with warranty, having no title, and loses the purchase money, and thereafter the land falls into the hands of a remote vendee, without notice

of the lien, and the land should be recovered from him, then as the warranty runs with the land, this remote vendee might recover for the eviction against the original vendor, and thus he would be subjected to a double loss. Now it does seem to me, that those hardships and liabilities on the part of the vendor, constitute the only sensible foundation on which to place the lien in any case. If it can be shown then, that the assignor of a bond for land, is exempt from a great part of the burden imposed on the vendor and obligor, the reason for establishing a lien in his favor, will certainly not be so strong, as it is in favor of the vendor. It is indisputable, from the repeated decisions of this court, that the assignor, by the mere act of assignment, incurs no responsibility whatever, beyond a guarantee of the genuineness of the obligation assigned, and an implied promise to be answerable for the consideration received, upon condition, that the assignee uses due diligence, and fails to recover from the obligor. The assignor is not bound to warrant the title to the thing which the assigned obligation calls for, without an express stipulation. If it be land and it be taken by a paramount claim, the assignor escapes; although he may have received from his assignee double the sum he gave, provided there is no fraud; *Bedal vs. Smith*, III. Mon. 290, and *Stafford vs. Steele's executors &c. in jra.* If the land cannot be recovered at all by the assignee from the obligor, and damages can be had for the failure to convey, the assignor is irresponsible; See *Moredock &c. vs. Rawlings*, III. Monroe, 73, in addition to the above cases. Every sale of a chattel does, *per se*, contain a warranty of title. Every sale of land where the vendor agrees to make a title, or which I take to be the same thing, to convey by a "good and sufficient deed," without saying what kind of a title it shall be, requires a fee simple title and a deed with warranty. These positions have never been disputed, so far as I know, since the cases of *Chipp vs. Woods*, Hardin, 582; *Fleming vs. Harrison's devisees*, II. Bibb, 171, and *Calmes vs. Buck*, IV. Bibb, 453. Now when Ligon is not bound for the title in any manner whatever, when there never was the

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&c.

Dissent.

shadow of a responsibility imposed upon him in relation to the title, and when it is certain that he never had any title to sell, I cannot perceive the ground upon which he can be considered as the vendor of land, and as such entitled to a lien.

Bonds for the conveyance of land, like bonds for money, are made assignable by statute. They are technically speaking, no more than *choses in action*. The legislature gave to them an assignable quality, because it was deemed compatible with the interests and convenience of the people. If the legislature had designed to impart to these assignable *choses in action* the character of mercantile paper, subject to the rules of the *lex mercatoria*, it would be difficult, if not impossible, to prove that the assignment could be clogged with any implied lien in favor of the assignor in any case. But there is no ground for supposing that the legislature intended to put title bonds upon a footing with bills of exchange. It is a point settled by adjudged cases. Nevertheless, the legislature did intend to give to the assignee a perfect right to the *chose in action*, and they expressly declared that the assignee might sue upon it, in the same manner that the original obligee might or could; saving, however, to the obligor the same defences, both in law and equity, which he might have asserted against the obligee. The statute treats the contract of assignment as the transfer of a *chose in action*, and not the sale of the thing which the bond may call for. It subjects the assignee to but one condition, and that is, the defences which the obligor may assert against him, growing out of transactions with the obligee or assignor. The maxim is, that the expression of one thing is the exclusion of others. And yet the opinion of my brethren makes the assignee take the bond subject to another burden, to-wit: an implied lien in favor of a remote assignor, between whom and the holder (as in this case) there is no privity whatever. It is hardly necessary to say that an assignee cannot pursue a remote assignor, but must go on his immediate assignor in case the principal fails. This doctrine is too well settled to need the citation of authority in support of it. And yet the remote assignor, by the help of

the lien created in his behalf, goes on the remote assignee, and compels him to pay the debt of the insolvent intermediate. It does seem to me that there is no reciprocity or justice in this.

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Dissent.

I maintain that the assignment of a title bond, under the statute, is not a sale of land. I think the foregoing considerations are entitled to some weight in proving it, but there are others equally satisfactory to my mind.

If the doctrine contended for in the opinion can be supported at all, I think, it will be conceded, that it can only be sustained by the aid of the maxim, that the chancellor will consider all things done which ought to have been done. Under this maxim the chancellor may say, that the obligor ought to have conveyed to the obligee, and he to his assignee, and so on. Now it seems to me that the chancellor cannot, and ought not to say any such thing, and that he is forbidden by the statute. The effect of the statute and of every adjudication, where the obligor has notice of the assignment, is, that he must perform to the assignee and to him only. If the covenant, by its terms, is not due when the assignment takes place, it is to be performed with the assignee. If it has been broken when the assignment takes place, the damages are to be paid to the assignee. In the first case, it would be against common sense, for the chancellor to say, I will consider that as done which ought to have been done, and therefore, I will regard the obligee as having got the title from the obligor, and passed it to the assignor, when in truth, the title was never due to the obligee. In the second case, where the assignee is entitled to damages, and receives the assignment, as he may do, because the covenant has been broken, it would, as it seems to me, be a very novel determination in any chancellor, to consider a thing as done, which the covenant shewed had not been done, and which, if performed to the assignor, according to this strange supposition, would have made him guilty of a fraud in assigning an obligation which he must know had been satisfied. I therefore look upon the maxim under which the lien in this case must be sustained, if at all, as altogether inapplicable.

LIGON  
vs.  
ALEXANDER  
&c.

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Dissent.

But again, before the chancellor can convert the assignment of a title bond into a sale of land, and attach a lien to it, he must presume that the obligor has a good and valid title to the land. If a vendor gives a bond to convey land to which he has no title, and it passes by assignment through a hundred hands, it is impossible that any one of them can have a lien on it, growing out of the transaction. Contracts between others cannot create a lien on the land of A, when he is no party. Now it may be the very want of title in the obligor, which induced him to violate his bond, and which entitles the assignee to damages. Is it not strange, in such a case, that the chancellor should presume he had title, in order to create a lien. I had supposed heretofore, that the rational presumption was, that when a man failed to comply with his contract, law and charity both required us to presume that he had not, on the day it was due, the thing it called for. If he had it, he should have delivered it or conveyed it, such being his duty. However this may be, I certainly perceive no reason to presume, when a man fails to discharge his engagements, that he was very able to do it, but would not. Before his failure the presumption of law is, that he will comply, and that he is able. I do not see how his failure lets the presumption of his ability stand, and changes the presumption in regard to his will.

I consider it the duty of the vendor who asserts a lien on land, to show the existence of such a title as the lien contended for, may connect itself with. How is the assignor of a title bond to do this? He can only do it by setting forth a title in the obligor. And how is he to reach this title? He can only do it by inducing the chancellor to compel the assignee to accept it. Where the obligor has title and has violated his bond, the assignee may sue for a specific execution, or for damages, at his election. Which he will do is matter of uncertainty. If he sues for damages will the remote assignor have a lien on them, to secure his demand? If he would, then I see no reason why he would not have the same lien on a judgment for debt or damages upon any description of contract, to secure claims against his im-

mediate assignee. Surely where the holder of the bond or last assignee converts his *chose in action* into a judgment for damages, there can be no implied lien upon it in favor of any assignor. This renders the lien contended for, dependent upon a condition which may or may not happen. If the holder of the bond goes for the land, then there is a lien; if he goes for damages, then there is none! Thus this implied lien remains *in dubio*, dependent upon the election of the last assignee, instead of fixed legal principles. This difficulty, the opinion waives, and in substance says, whether the recovery of damages would or would not destroy the lien, need not be determined; for conceding it, that should not prevent the enforcement of the lien previous to such recovery. This is a distinct avowal, as I understand it, that a remote assignor can compel the assignee to accept the land, and thereby control him in the exercise of his election in suing upon the bond. This, to my mind, is a direct violation of the statute, which gives to the last assignee, the same right of suing, which the obligee would have had by retaining the bond; and that can be nothing less than an uncontrollable right to sue for a specific execution or for damages at his election. See the consequences of compelling the last assignee to take the land. The vendor sells at a high price, and then trifles with his contract until the land falls in price one half. If he had conveyed, as he ought to have done, the assignee might have made a profit even upon the vendor's price. Compelling the vendor to return the purchase money with interest may do justice; but if you compel the assignee to take the land, now worth only half, and then sacrifice it to discharge the implied lien, you do effectually, by such an interference, deprive the assignee of one half of the value of his demand against the obligor upon the bond. I never can consent to such a doctrine.

But again, we have discovered the maxim that the chancellor will consider as done that which ought to have been done, as applicable and efficacious in one class of cases bearing analogy to this. We have decided that we will not, in order to secure dower to the wives of the intermediate assign-

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vs.  
ALEXANDER  
&c.  
Dissent.

LIGON  
vs.  
ALEXANDER  
&c.

Dissent.

ors, take it, that the title had successively passed through their hands to the last assignee. So far as the donor right of the assignor's wife is concerned, we look upon the assignment as the evidence of the transfer of a *chose in action* merely; but now when the assignor wants to make the remote assignee surety for an insolvent debtor, by implication, we see the subject through different optics, and regard the title as having regularly passed through the various assignors down to the last assignee, and thereby fix a lien upon the land!

How is this new application of the doctrine of liens to work in practice? The obligor has received his purchase money; the last assignee has paid all he agreed to give for the bond. The effect of the statute is to put them in the attitude of obligor and obligee, as though they had been the original contracting parties. But under the opinion, the assignors, who have not been paid the consideration promised them for their respective assignments, have a right to break the relation subsisting under the statute between the obligor and last assignee, and have all their liens settled. There may be ten or twenty assignors. How long will it take to end the war of liens which they may carry on? Suppose the purchase money due to A, the first assignor, is not due for ten years, then his lien cannot be enforced until the end of that period. But suppose the money due B, a subsequent assignor, is due immediately, can he charge the land in the hands of the last assignee forthwith, or must he wait patiently until it shall be seen whether A's lien will be enforced at the end of the ten years? Being opposed to the whole doctrine, I shall not undertake to answer this question, and I shall refrain from putting more.

The case of *Stewart vs. Hutton*, III. J. J. Mar. 178, aside from the *obiter dicta* it contains, does not touch the present. An entry and survey constitute an inchoate legal estate. It is subject to execution, and I still think the vendor of such an estate is as much entitled to a lien as if he had obtained the patent. As to the case of *Ried vs. Wiseman's heirs*, it is still within the power of the court, and I think the opinion should be withdrawn, I confess that in

these cases my mind was not struck with the importance of the doctrine which they are quoted to support. In assenting to them, I did not perceive the trainnels to the business transactions of men, in regard to the assignment of title bonds, nor the great danger of permitting the assertion of implied liens against the last assignee, and fixing him with notice by the testimony of witnesses liable to forget or misrepresent, which I now do. Nor did I then discriminate between the sale of land, and the transfer of a *chose in action*. I consider it better to make this acknowledgement than to persevere in error.

Believing that the doctrine of lien is misapplied, and that the error of the court consists in regarding the assignment of a *chose in action* as a sale of land, and that it will operate injuriously to society, I think the circuit court properly sustained the demurrer.

### Cowan vs. Montgomery.

CHANCERY.

Error to the Lincoln Circuit; BRIDGES, Judge.

Case 96.

*Jurisdiction. Practice. Waiver.*

Chief Justice ROBERTSON delivered the opinion of the court.

May 1.

MONTGOMERY brought a suit in chancery in the Lincoln circuit court, against Cowan for a settlement of partnership accounts. The subpoena was served on Cowan in Pulaski county. He never appeared. The bill alleged that he had agreed, in writing, prior to the institution of the suit, that it might be brought in the Lincoln circuit court. The bill was taken for confessed; and thereupon the circuit court decreed that Cowan should pay to Montgomery \$783 50.

Waiving other obligations to the decree, the want of jurisdiction is fatal to it.

As the cause of complaint was transitory, the Lincoln circuit court had no jurisdiction, unless process had been served in Lincoln, or unless Cowan had, by an answer or otherwise, waived objection to the want of jurisdiction. As he did not appear, we cannot perceive how the alleged agreement to

Cause of action transitory. Circuit court alone of the county in which defendant resides has jurisdiction; unless process be executed in the county in which suit



**MASON et al.** allow the Lincoln circuit court to adjudicate could  
**vs.** give it jurisdiction. That agreement, if ever made,  
**PECK.** was prior to the institution of the suit, and could  
 not, *per se*, confer jurisdiction.

is commen- Moreover, before such an agreement would have  
 ced; or unless any effect as an estoppel (even if it could so operate  
 defendant, by under any circumstances) it should be proved as ad-  
 his appear- mitted—and before the court could hear proof or  
 ance and an- take the bill for confessed, jurisdiction of the case  
 swer or a- was indispensable. Jurisdiction could not have  
 greement been derived from the alleged agreement, because  
 waive objec- the court had no right to take the bill for confessed,  
 tion to juris- or to notice the agreement until jurisdiction to ad-  
 diction, no judge in the case had been conferred.  
 the com plain-  
 ant's bill can  
 give jurisdic-  
 tion. The

court cannot Wherefore, the decree of the circuit court is re-  
 take the bill versed, and the cause is remanded, with instructions  
 for confessed, to dismiss the bill for want of jurisdiction.  
 nor make any  
 order upon  
 defendant's  
 until jurisdic-  
 tion is obtain-  
 ed.

*Owsley*, for plaintiff; *Monroe, Cunningham* and  
*Harlan*, for defendant.

#### CHANCERY.

### Mason et al. vs. Peck.

Case 97.

error to the Nicholas Circuit; BROWN, Judge.

*Specific performance. Notice. Fraud. Chancery  
 practice. Deposition, incompetent, on account  
 of interest in deponent.*

May 1

Chief Justice ROBERTSON, delivered the opinion of the Court.

PECK filed a bill in chancery against Case, for a specific execution of a contract for land which Case had sold to him. He made Stockton, Mason, McMurtry and others, defendants, and charged them with having fraudulently procured the legal title, with a full knowledge of his equity. The circuit court decreed a specific execution in favor of Peck, and directed Mason and others to convey to him the legal title.

This writ of error is prosecuted to reverse that decree.

The decree must be reversed for the following reasons:—

If complain- I. Case, in his answer, alleges that he and Peck  
 ant fail to au- had, at the instance of the latter, virtually rescinded

the contract, prior to the conveyance to Stockton, with whom Mason and McMurtry were associated in interest. He calls on Peck to answer the allegation, but he failed to do so. It should be admitted, therefore, that the allegation is true; and consequently Peck can have no available equity against subsequent purchasers.

II. There is no sufficient proof that Stockton had any notice of Peck's equity, (even if it existed) when he became a purchaser for a valuable consideration, to wit, *the same price which had been promised by Peck.* The deposition of Hughes is inadmissible—because he is interested in the event of the suit. There is but one other deposition tending to prove that Stockton had notice, and that deposition is entitled to scarcely any effect, and cannot countervail the peremptory denial of notice in Stockton's answer.

III. Case had no title, because Howard, under whom he claimed, has failed to shew that he himself ever had a good title. Hughes, claiming to be guardian for two infants (Thomas and Lydia Swearingen,) and claiming also under a deed purporting to have been executed by Van Morgan, as agent for Drusilla Thornburgh, sold and conveyed the land to Howard. But there is no proof of his authority to sell as guardian. And Van Morgan had no authority to sell for Mrs. Thornburgh any greater interest than she had acquired under the will of Thomas Swearingen Sr. which, if she held such interest (and it is far from appearing clearly that she did) did not exceed an undivided eighth part of the tract of 150 acres now in controversy. In addition to all this, Van Morgan has sworn that Hughes had imposed upon him, and had surreptitiously obtained a deed to himself, which, when signed, was represented by him and understood by Van Morgan to be only an authority to sell the land for a stipulated sum to Howard.

And he has also sworn that Hughes refused to pay any thing for the land, and had agreed to surrender the deed.

IV. Drusilla Thornburgh and Thomas and Lydia Swearingen have, for a valuable consideration, conveyed the whole of their title to McMurtry.

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PECK.

answer a fact charged by defendant, and which defendant calls upon him to answer, the allegation must be taken as true. Deposition of one interested in the event of the suit, inadmissible. One witness not sufficient to establish notice of prior equity against the positive denial of the answer. Sufficient grounds to refuse specific execution of contract to convey land, that party against whom relief is demanded had no title.

WOOLEY  
vs.  
STONE &c.

Under all these circumstances, with others, were it necessary to mention them, the decree cannot be sustained.

Purchase of land pending suit in circuit court, gives to the purchaser such an interest as will authorize him to prosecute a writ of error in the names of those whose title he may have acquired without exhibiting any express power.

It appears that Mason had acquired all the title of his co-defendants, and that Thomas Triplet, who prosecutes this writ of error in the names of Mason, Stockton and others, purchased Mason's interest under a decree during the pendency of this suit in the circuit court. We are of opinion that Triplet has such an interest as will authorize this court to protect him in the prosecution of the writ of error in the names of those from whom he acquired that interest--and that, consequently, we shall not require (as we have been urged to do) any express authority from them, or any of them, for the prosecution of the writ.

Wherefore, it is decreed that the decree of the circuit court be reversed, and the cause remanded with instructions to dismiss the bill.

*Triplet and Brown*, for plaintiffs; *Haggin, Chinn and Talbot*, for defendant.

CHANCERY.

## Wooley vs. Stone &c.

Case 98.

Error to the Gaillard Circuit; BRIDGES, Judge.

*Jurisdiction of Chancellor. Choses in action. Execution. Nulla Bona. Statute.*

May 1.

Judge UNDERWOOD delivered the opinion of the Court.

WOOLEY, holding notes upon S. Stone, before he obtained judgments upon them and had executions returned *nulla bona*, filed a bill against Stone for the purpose of restraining him from making fraudulent transfers of his property and *choses in action*. Lackey, a defendant, owed Stone for land, and one object of the bill was to subject the debt due by Lackey to Stone.

Chancellor has no jurisdiction over the *choses in action* of a debtor, nor to restrain him in the sale of

We are of opinion that the chancellor had no jurisdiction of the matters contained in the bill, until Wooley had obtained his judgments, and had executions returned *nulla bona*; and therefore the whole proceeding until the supplemental bill was filed, setting out the judgments, executions and returns of

*nulla bona*, should be regarded as *coram non judice*.  
**M. Fenan vs Jones and Crutcher, II. Litt 219.**

Before the supplemental bill was filed, Wooley had settled the amount of debt due by him to Stone, and therefore there is no ground for a decree against him. We do not perceive how we can with safety decree in favor of Wooley upon the record as it now stands, against any of the other defendants. The testimony of their participation in the imputed frauds, with a view to defeat the payment of the debts of Wooley, is insufficient to counteract their positive denial. The lien upon the land, asserted against Lackey, cannot be sustained for the same reason. Wherefore, the decree is affirmed.

*Anderson*, for plaintiff; *Owsley*, for defendant.

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vs.

**JONES-**

his property  
 until com-  
 plainant has  
 obtained his  
 judgment &  
 had execu-  
 tions return-  
 ed *nulla bona*

## Railey vs. Jones.

Error to the Nelson Circuit; **HOOKE**R, Judge.

**COVENANT.**

### *Covenant. Performance.*

Case 99.

Judge **UNDERWOOD** delivered the opinion of the court.

May 1.

**RAILEY** purchased a printing press and type from **RAY**. To secure the purchase money, he executed a mortgage to **RAY** upon the press and type, bearing date 12th October, 1824. In February, 1825, **Railey** sold to **Wickliffe** one half or an equal interest in the press and type, for \$162 50, to be paid on the 28th September, 1825, and \$162 50, to be paid on the 28th September, 1826, and \$125, to be paid by the 1st March, 1825: this last sum being as the agreement recites, the half of the amount actually paid by **Railey** to **Ray**, and the two first named sums being half the amount contracted to be paid to **Ray**, and for which he held a lien on the press and type. On the 29th of August, 1826, **Railey** sold his remaining interest or half of the press and type to **Jones**, who agreed to pay therefor \$210, in Commonwealth's Bank notes, to **Ray**, or to the holder of said **Railey's** note, due in "*October next*;" also, \$84 40, in the same currency, &c. On the 1st of October, 1827, **Wickliffe** sold his interest in the press and type to **Jones** for \$225. The agreement between them contains the following stipulation:

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"Said Jones also obliges himself, when the press and type shall be sold under a decree pronounced at the September term of the Nelson circuit court, to bid in and purchase the same, or cause it to be done, so that said N. Wickliffe shall be released from all or any part of the debts owing on account of the original purchase of said press, &c. from Ray by Railey. It is also agreed by the parties, that, upon the payment of the sum herein stated due S. Ray on the decree referred to, that all claim, right, interest and title, of said Wickliffe is to cease."

In September, 1827, Ray obtained a decree foreclosing his mortgage, and an order for the sale of the press and type, to raise the sum of \$325, with interest thereon from the 12th of October, 1826, and on the 29th of October following. the press and type were sold by the commissioner, when Jones became the purchaser at \$300, thus leaving a balance of the principal, besides interest and costs due from Railey to Ray, and which Railey was compelled to pay by execution to Hundley, the assignee of Ray.

It is very clear that Railey, by his contracts with Wickliffe and Jones, had fully provided for the settlement and discharge of his note for \$325, in Commonwealth's paper, due Ray on the 12th of October, 1826. Jones was, by his contract, to pay \$210 of the amount to Ray, or to the holder of the notes. Wickliffe's payments were to be made to Railey, and if he had placed the funds in Railey's hands according to contract, then Railey would have been enabled thereby to discharge the balance due Ray, or his assignee, after the payment of \$210 by Jones. But Wickliffe, instead of paying Railey, sold to Jones and took Jones' covenant, that he would purchase in the press, &c. when sold under the decree, so as to release him, Wickliffe, from any debt owing on account of the original purchase by Railey from Ray.

Railey instituted this action of covenant upon the contract with Jones, and assigned a breach in the non-payment of the \$210 by Jones upon the note for \$325, due Hundley, assignee of Ray, in Oct. 1826.

The court instructed the jury "that if they believed that Jones had paid under the decree the sum of

\$300, and that sum, exclusive of interest and costs, amounted to more than \$210; and if they further believe that Jones paid the judgment against Raile<sup>Y</sup> as specified in the covenant sued on (towit, the \$84 40, which were to be paid in discharge of a judgment against Raile<sup>Y</sup>) then the law is for the defendant, and they ought so to find." The jury found for the defendant.

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If the foregoing instruction be incorrect, the judgment must be reversed. That the payment of \$300 under the decree, whether after deducting interest and costs, the balance would amount to \$210 or not, was no discharge of Jones' covenant to Raile<sup>Y</sup>, we think very clear. The suit by Hundley, as assignee of Ray, was not commenced against Raile<sup>Y</sup> until the 5th of June, 1827. Raile<sup>Y</sup>'s note for the \$325, was due on the 12th of October, 1826, near eight months before suit was instituted upon it. Now we think it was the duty of Jones to have paid the \$210 at farthest, when Raile<sup>Y</sup>'s note became due. He agreed to make the payment in August before the note became due. If he had done so, it is manifest that Hundley would not have obtained a judgment against Raile<sup>Y</sup> for the whole amount of the note for \$325, as he did do, and then by the sale of the press and type under the decree, a sum sufficient to pay the judgment, after crediting the \$210, would have been raised. It is needless, however, to comment on the advantages which would probably have resulted to Raile<sup>Y</sup> from such a course, for we are of opinion that the payment under the decree was no payment upon Raile<sup>Y</sup>'s note; for that note had been merged in the judgment obtained thereon by Hundley before the mortgaged property was sold under the decree. The purchase of the mortgaged property when sold under the decree, by Jones, and paying three hundred dollars for it, was no more a payment on Raile<sup>Y</sup>'s note, than if the mortgaged property had been purchased by a stranger to the transaction. It appears that no part of the money was paid by Jones, under his purchase of the mortgaged property until more than eight months had expired after the judgment was obtained by Hundley against Raile<sup>Y</sup>. The payment of the money then, under the

Covenant to pay \$200 on a note of covenantee for \$325 in the hands of a third person, not discharged by the payment of \$300 in the purchase of covenantee's property, mortgaged to secure the \$325, long after the payment ought to have been made, according to the tenor and effect of the covenant, & the note for \$325 had been merged in a judgment against the drawer of the note. Purchase of the mortgaged property by covenantor and payment of \$300, for it was no more a performance of the covenant than if done by a stranger.

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decree could not amount to a legal satisfaction of Hundley's judgment, and was therefore no compliance with Jones' covenant to Railey.

The judgment must therefore be reversed, and the cause remanded for a new trial, not inconsistent herewith.

The plaintiff in error must recover his costs.

*Rudd*, for plaintiff; *Crittenden*, for defendant.

CHANCERY

Case 100.

May 2.

### May's heirs *vs.* Fenton *et al.*

Appeal from the Bracken Circuit; ROPER, Judge.

*Estoppel. Parties. Privilege. Exchange. Specific Execution.*

Chief Justice ROBERTSON delivered the Opinion of the Court.

ON the 9th of October, 1782, John May and William Kennedy entered into a covenant, whereby Kennedy undertook to locate, on as good land as was vacant in Fayette county, Kentucky, two land warrants (for 42,532 acres of land in the aggregate) which had been issued to John Tabb, and which May delivered to him (Kennedy,) and May covenanted that Kennedy should be entitled, for his services, to "one sixth part of all the land obtained thereupon, clear of all expenses." It does not appear certainly how May had acquired an interest in the warrants; nor does the extent of his interest appear, except from a memorandum made by himself on the 15th of August, 1785, in which he stated, among other things, that Tabb's two warrants for 42,532 acres had been located for the benefit of himself and Tabb, and William May, George May and William Kennedy, and that the said parties were entitled to the following interests therein—towit—Tabb three sixth parts—William Kennedy one sixth part—William May one sixth part—and George May and himself (John May) one sixth part, or one twelfth part each.

The warrants having been entered in five separate parcels in 1784, grants were issued to Tabb and John May for 41,846 acres in the following manner: one grant was issued on the 15th of November, 1786,

for 18,000 acres to Tabb and John May jointly—<sup>MAY'S HEIRS</sup> three other grants were issued on the 14th of November, 1786, two of them to Tabb and J. May <sup>vs.</sup> FENTON et al jointly—(the third is not filed)—and another grant was issued to Tabb alone for 1,278 acres.

John May died in the year 1790, leaving a widow and two infant children in Virginia. On the 15th of August, 1785, William May sold his interest to Matthew Walton, who afterwards sold it to Lewis Craig. On the 27th of March, 1792, Tabb and George May sold their interests to Philemon Thomas. On the 5th of June, 1787, John May and William Kennedy agreed to make an exchange of a portion of May's interest in the survey of 18,000 acres, for Kennedy's interest in 4,532 acres of other locations of Tabb's warrants.

On the 28th of June, 1792, the legislature of this state, at the instance of Craig and Thomas, passed an act for making partition between them and John May's heirs, of the 41,846 acres of land, by assigning to them three fourths, and to May's heirs one fourth.

The partition of the 18,000 acre tract, seems to have been made in the fall 1792, but was not reported until September, 1794, (no partition seems to have been ever made, of any of the other tracts.) The partition thus made assigned to John May's heirs 3,000 acres in one place, and 500 acres in another place, and the residue of the tract to Thomas and Craig, after platting out a considerable portion which was covered by prior claims deemed superior to that of Tabb and Co.

Lewis Craig bought Kennedy's interest in the contract with John May for exchange of lands, and also his original interest in the 18,000 acres. The article of agreement, reciting this contract, is dated December 6, 1792, and, among other things, excepts from the sale, Kennedy's interest in a salt spring, and "2,000 acres of land laid off by commissioners appointed by the General Assembly of the state of Kentucky, to include the said salt spring," and stipulates that, if Tabb's entry should be ascertained to be superior to that of Williams,



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which interfered with it, Craig should convey to Machir 250 acres, in compliance with a covenant previously made by Kennedy to Machir, and also that "if any part of said Tabb's entry, *which has been divided by said commissioners*, and which is now sold by said Kennedy, shall hereafter be taken by a better claim or claims, then the said Kennedy agrees to refund to said Craig £30 for every 100 acres so lost, and so in proportion for any lesser quantity." Craig also purchased from Walton, William May's interest in the whole 41,846 acres; the written transfer by Walton is dated in 1795; but the appellees allege that the contract was, in fact, made prior to the passage of the act for partition.

Thomas afterwards released to Craig, who lived on the 18,000 acre tract, and who, having, as he supposed, purchased from John May's executrix, all his interest in that tract, sold and conveyed to various persons the 3,000 acres which had been assigned to May's heirs, and which lie in Mason and Bracken counties: after these purchasers had lived several years, on the lands respectively bought by them, May's heirs obtained judgments in ejectment against them, to enjoin which a suit in chancery was brought by Frazee and others, in the Mason circuit court, and another suit in chancery was instituted by Fenton and others in the Bracken circuit court. The suit in Mason (removed to Nicholas) was heard first, and came to this court, where the decree of the circuit court, for perpetuating the injunction to the judgment in Mason, was reversed; a reference to the opinion of this court in that case, IV. Littell's Reports, 391, will render a recapitulation of all the facts, common to both cases, unnecessary. After that opinion was delivered, the complainants in this case, amended their bill, and averred that Craig bought Wm. May's interest prior to the act of 1792; that he did not buy Kennedy's interest in the 18,000 acres, until after the passage of that act; and that, in the assignment by the commissioners to May's heirs, Kennedy's interest as locator, was included, so as to make one fourth of the tract. The answer requires proof, &c. insists on the conclusiveness of the opinion of this court in the other case, and avers

that the parties in this case had agreed to submit to the decision of that, before the opinion referred to had been rendered. The circuit court decreed relief to the complainants, and the defendants have appealed to this court.

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If the parties agreed that the decision in the case of May, s heirs vs. Frazee et al. should control this case, it would certainly be unjust for the appellees to evade that agreement. It is not improbable that some such understanding existed, because this case seems to have been neglected and permitted to remain stationary from the date of the alleged agreement, until after the opinion of this court in the other case had been rendered. But there is neither any direct parol evidence of any such contract, nor any record or written memorial of it. Therefore, however the fact may happen to be, this court cannot give any effect to the agreement insisted on in the answer to the supplemental bill. Nor can the opinion in the case of Frazee et al. be admitted to be decisive of the merits of this case, merely on the ground that the same subject matter is involved in both, and that the facts in each case are chiefly the same; because the parties are not the same; the facts are not precisely the same, and that opinion, so far as it is a deduction from facts, cannot be authoritative in any other case, as to persons who were neither parties nor privies in that case.

Agreement to permit one suit to abide the decision of another, if established, would be respected by the court.

The opinion of the court, deduced from facts in one case, cannot control in other, though the subject matter be the same and the facts chiefly the same, when the facts are not precisely the same, and the case is not between the same parties or privies.

Nor can the lapse of time prejudice the equity of the appellees. They have satisfactorily proved that, many years ago, they acquired, as bona fide purchasers, all Craig's interest, (to the extent of their claims,) in the 3,000 acres of land assigned by the commissioners to May's heirs, and that they have resided on the lands, purchased by them from Craig, ever since the date of their contracts, and there is sufficient reason to infer that they never apprehended that there was any defect in their titles, or that May's heirs had any claim or would ever prefer any, until the ejectment was sued out against them. Under such circumstances time is rather favorable than otherwise to their claim to relief.

Where party seeking relief has been always in possession of land under contract, lapse of time is no bar, but rather operates advantageously.

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The circuit court, recognising and ratifying the partition by the commissioners, and supposing that Kennedy's interest was included in the part allotted to May's heirs, decreed that the contract for exchange, between Kennedy and John May, should be enforced, and that the injunction should be perpetuated to the extent of the quantity of land to which the appellces were deemed to be entitled under that contract, and for two thirds, (Kennedy's interest as locator,) of so much of the 3,000 acres as he in Bracken, and was not concluded by the opinion of this court in the case from Mason.

Bill to enforce specific execution of contract for exchange of land; complainant must show that the contract can be fairly and availably executed on his part.

For the reasons assigned in the case of May's heirs vs. Frazee et al. and for other reasons which it would be useless now to add, we are not disposed to disturb the partition made by the commissioners: only two questions, therefore, are presented; by the decree, for revision. 1st. Should the contract for exchange be specifically enforced? and, 2d, Should Kennedy's interest, whatever it may be, original or derivative, be decreed out of the land allotted to May's heirs.

1. Before Kennedy or those claiming under him can be entitled to the full benefit of the contract with John May, for exchange of interests, it should be made clearly to appear that the exchange can be made justly and effectually. May was to exchange a portion of his interest in the tract of 18,000 acres, for so much land in another tract as *should be obtained* by Kennedy, for his interest of one sixth as locator. *This contract was made after the emanation of the patents for all the land.*

Contract to exchange with C. for so much land as may be obtained by him for his interest as locator after the emanation of the patents not a chancing bargain; nor is the fact

It would seem, therefore, that May did not intend to take the chance of Kennedy's interest, or to carry the contract into effect to any greater extent than Kennedy's interest in the land which the patents should hold against the world. It would seem, also, that it was apprehended that there were prior appropriations of the 4,500 acres; for, on any other hypothesis, it would be difficult to imagine why, after all the legal titles had been perfected, May stipulated to exchange for so much land only as should be obtained. The fact, therefore, that pa-

tents have been obtained for a part of the 4,500 acres, cannot be admitted as sufficient evidence, in this controversy, to prove that the *land* or any part of the land so granted, was vacant, or has been "obtained," so as to be available to the appellants. On that point the appellees have procured no evidence; nor have they even ventured to allege that the appellants ever obtained, or ever can obtain, a foot of the 4,500 acres. The appellants have averred, in their answer, that the whole of that land was covered by prior and valid claims; and although that averment has not been sustained by any direct proof, nevertheless it seems to us that the appellees have not shown, satisfactorily, that there should be a specific execution of the contract for exchange: and as the grants are insufficient (for the reason which has been suggested) to impose the onus on the appellants, it was surely incumbent on the appellees, seeking a specific execution, to show that it could be decreed consistently with justice and reciprocity. If this could be done, it would have been easy for them to show it; and it was peculiarly proper that they should, at least, have attempted it, as Kennedy was the locator, and the appellants had been non-residents and infants during the greater part of the time from the death of their ancestor to the institution of their ejectments. Besides, as the appellants positively swear in their answer, that no part of the 4,500 acres had been saved, and as the appellees have made no allegation on that subject, but, by insisting that the contract of exchange was "a chancing bargain," seem rather to admit the fact averred in the answer, it is quite probable that no part of the 4,500 acres has been "obtained" available, or ever can be, to the appellants. We cannot admit that the contract can be fairly construed as a "chancing" one. Wherefore, the equity of the appellees is, in this particular, too questionable to justify a specific execution.

II. But on the second point involved in the decree, we concur with the circuit court. As the original interests of all the partners are clearly shown, by proof and by admissions, to have been such as John May's memorandum represented them to be,

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of the land being patented, proof that it has been obtained; the party claiming execution of the contract must show the title safe.

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and as there is no proof, or even intimation in the record, that Kennedy's interest was ever diminished or John May's ever enlarged, except so far as the act of 1792 may tend to authorize some such inference, so much of the decree as we are now considering, must be sustained by showing, that Kennedy's interest of one sixth, was not purchased by Craig or Thomas until after the passage of the act; that it was not included in their interest of three fourths, designated in the preamble, but that it was included in the one fourth ascribed to May's heirs, and was also included in the allotment made to them by the commissioners. All this will, in our opinion, satisfactorily appear upon a careful examination of the facts; and if it shall, there can be no doubt that this part of the decree is right.

One having no agency in procuring an act of the General Assembly making partition of land, and not mentioned in it cannot be affected by it's provisions, nor by the preamble, & his title must remain unimpaired unless sold prior to the act. Such act is evidence only against parties and privies; but not against him who had no agency in its procurement.

As Kennedy had no agency in procuring the act for partition, and was not mentioned in it, *neither he nor those claiming under him can be affected by the preamble or by the act itself, unless he had sold his interest to Craig prior to the date of the act.*

The conveyance by Tabb, of his interest, to Thomas, bears date in 1794, two years after the date of the act. But there is conclusive proof (in *this record*) that he had sold his interest to Thomas, by executory contract, in March 1792, prior to the date of the act. It also appears that Thomas bought George May's interest, of one twelfth, in March, 1792. Admitting that Tabb's interest was three sixth parts or one half, when he sold to Thomas, only one sixth was wanting to make Thomas's interest three fourths, after he had acquired the interest of Tabb, and of George May, in March, 1792. Either Kennedy's or William May's interest would supply this deficit exactly, and make up the three fourths represented in the preamble, as belonging to Craig and Thomas, in consequence of contracts made by them with the original claimants; leaving to John May one twelfth, and to the party, who had not sold, one sixth, constituting the remaining one fourth.

Philemon Thomas, in his deposition filed in the case, but objected to as incompetent, swore that Craig bought from Walton, W. May's sixth part,

prior to the passage of the act; thus making the three fourths described in the preamble, as belonging to Thomas and Craig; that Craig did not buy Kennedy's interest until December 1792, after the partition had been made, and that Kennedy's interest was blended with John May's in the preamble, and in the partition. This deposition, if admissible, must be decisive. It may be difficult to perceive why Thomas was not a competent witness; but as an extensive analysis of facts would be necessary for ascertaining whether he was competent or not, and as we deem the facts stated by him sufficiently established without his deposition, we will not give it any effect, and shall thus waive a decision on its admissibility.

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It is not pretended that John May ever acquired any right to the interest of Kennedy, or to that of W. May, or that either of the latter ever sold to any other person than Walton and Craig; consequently J. May's interest, at the date of the act of assembly for partition, could not have exceeded a twelfth part, and either William May's interest, or that of Kennedy, must have been blended with it in the preamble and in the partition, unless Thomas and Craig had acquired, prior to the date of the act, the interests of both W. May and Kennedy. The preamble is evidence against Thomas and Craig only, and proves that their interest did not exceed three fourths; but it is not evidence against Kennedy, or those now claiming under him, to prove that he had then parted with his interest; nor is it any proof in favor of the appellants (as between them and Kennedy) to shew that the interest of their father was never more than one twelfth. Indeed, J. May's interest could not have been increased beyond a twelfth unless he had bought from Tabb, and there is no intimation *any where* in the record, that he enlarged his original interest by any contract with Tabb.

There is no fact tending, in any degree, to prove that Craig had acquired Kennedy's interest prior to December, 1792, the date of their written contract. As that contract was very important and embraced multifarious matter, it is not probable that it was, in fact, made years, or even months, before it was re-

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duced to writing W. Craig and Orr (one of the commissioners who made the partition) have sworn, that Kennedy's interest was included in the allotment made to May's heirs, and that the interests of Tabb, W. May and George May were included in the residue allotted to Craig and Thomas; and this is intrinsically probable, because, as Kennedy had no interest except that to which his contract with John May for locating might have entitled him, he might have looked to J. May alone for the fulfilment of that contract, and therefore it was proper, especially in the absence of May's heirs, to assign to them their father's primary interest, *among the original partners*, of one fourth, and thus leave to Kennedy, and the representatives of J. May, the adjustment of their rights under their contract.

But there is another consideration which seems to be almost conclusive: *Craig bought from Kennedy his interest in the 18,000 acres only.* He and Thomas bought from Tabb, G. May and Walton (alias W. May) *all their interests in the whole 41,845 acres.* These interests amount to three fourths of the whole concern—as recognized by the act of assembly. But Kennedy's interest in the 18,000 acres alone could not (if added instead of W. May's) have made the compliment of three fourths of the 41,846 acres. If it could have made the interest of Thomas and Craig three fourths of the 18,000 acres, that interest in the 41,846 acres would have been less than three fourths, and *vice versa*; and besides, Kennedy would then have been entitled to a sixth of all the other tracts, and would not, on any reasonable hypothesis, have been, in that event, pretermitted in the act of Assembly. Nor can we imagine how Craig and Thomas could, in that way, have been entitled to three fourths of the 41,846 acres, when Kennedy's sixth in the 18,000 acres would have made their portion greater in that tract than in the residue of the whole quantity to be divided.

It is true, that Walton's transfer of W. May's interest, is dated in 1795; but that transfer is endorsed on J. May's memorandum; and it is, therefore, not only more probable that Walton had sold the interest before the endorsement was made, and before

the date of the act of Assembly, than it is that such a contract as that between Kennedy and Craig was made months before there was any written memorial of it; but all the facts, when consolidated, contain an intrinsic probability that Craig acquired W. May's interest prior to the date of the act, and did not acquire that of Kennedy until after the partition had been actually made. However, as Craig had acquired the interests of both Kennedy and Wm. May, it is not material which he acquired since, or which before, the date of the act of Assembly; one or both must have been bought since the date of the act, for there is not a particle of proof tending, in the remotest degree, to prove that both of these interests had been bought at that time—and there is conclusive proof, (intrinsic and extrinsic) that Kennedy's interest was not sold until *December, 1792*. The preamble of the act may prove, that the interest of Thomas and Craig did not *then* exceed three fourths—but it cannot prove that their interest has not *since* been enlarged. It may be proof that, *as between them and May's heirs*, the latter were entitled to one fourth, but it is no proof, *as between May's heirs and Kennedy*, that the latter, as the locator, was not entitled to any part of the fourth conceded to the former *by Craig and Thomas* in the preamble of the act of Assembly. Indeed, the act itself provided, that it *should not effect the interest of any person who was not mentioned in it; thereby intimating that some other person, than Thomas and Craig and May's heirs, still had an interest*. As then Kennedy was not affected by the act of Assembly, and there is no proof, as against him or those now claiming under him, that J. May's interest exceeded one twelfth; and as it is plain that Kennedy sold his sixth of the 18,000 acres to Craig, *after the passage of that act*, nothing in the act or in the record can have the magic effect of divesting that interest, or of swelling the interest of May's heirs to one fourth. Moreover, there is a writing in the record, whereby John May, one of the appellants, acknowledged, in 1815, that the interest of the appellants was only one twelfth, and it is not only not pretended but there is no pretext for pretending that their interest, *in the whole* 41,846

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acres, exceeds one twelfth: How it can have been enlarged to a fourth in the 18,000 acres alone, we would be unable even to conjecture.

It, therefore, seems to us, that May's heirs remained hable to Kennedy on the contract between him and their ancestor, for one sixth of the 18,000 acres, as well as of the residue of the 41,846 acres; and that, as Kennedy and those claiming under him, acquiesced in the partition, the appellees are entitled to a decree for two thirds of so much of the 3,000 acres allotted to May's heirs, as lies in Bracken, and is embraced in this suit. As Kennedy was entitled by his contract with John May, to one sixth of the land which should be obtained, it is not necessary for the appellees to show, (as it might be necessary for them to do under other circumstances,) that the whole of the quantity called for by the warrants was located or vacant land, or how much of that quantity was vacant.

As the circuit court decreed to the appellees a greater interest than we think them equitably entitled to, the decree is reversed and the cause remanded, with instructions to carry into effect the principles of this opinion, by such orders and decrees as shall be necessary and proper for effectuating the just rights of the parties, according to the standard herein fixed, and to the principles of justice and equity.

*Brown*, for appellants; *Beatty*, for appellees.

EJECTMENT.

### Morgan's heirs vs. Marshall.

Case 110.

Appeal from the Grant Circuit, *BROWN*, Judge.

*Deed. Copy. Testimony.*

May 2.

Chief Justice ROBERTSON delivered the Opinion of the Court.  
Judge Nicholas did not sit in this case.

THIS is an action of ejectment on a joint and several demise by Alexander S. Bullet, the patentee, and by James M. Marshall claiming title as his vendee. Judgment was rendered for the plaintiff in the action.

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We shall briefly notice and dispose of the material points in the order in which they are presented.

I. Bullit having died prior to the date of the demise, there could be no recovery on his title; and it, therefore, became material to the plaintiff to prove title in the other lessor, Jas. M. Marshall. To do this, (after proving the loss of a deed from Bullit to J. M. Marshall,) he was permitted to prove by Humphrey Marshall, that he was a subscribing witness to a deed for the land in contest, executed by Bullit to J. M. Marshall in 1792—and that other persons as well as himself had attested it; and was also permitted to prove, that the deed had been deposited, in the proper office, for registration, and proved by two of the subscribing witnesses in 1793, but that it was not fully proved within the period required by law—and that it could not be found, but had been casually lost. And thereupon a sworn copy which had been made out by a deputy clerk, was permitted to be read as evidence to the jury. To all this the appellants excepted. But we are of opinion that there was no error in admitting, as legal proof, the facts thus excepted to; they constituted evidence of as high a grade as any of which the case was susceptible.

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When the original deed is proved to be lost, and its execution is established by a subscribing witness, a copy sworn to have been made out by a clerk, as a true copy, is admissible to show title in the lessor of the plaintiff in ejectment.

II. It appeared that Humphrey Marshall, asserting an agency for James M. Marshall, (who resided in Philadelphia,) relinquished the title of the latter for taxes due to the Commonwealth. Upon this fact, the appellants moved the court to instruct the jury that, *if H. Marshall had relinquished the title to the State, the appellee had no right to recover.* The court refused to give such an instruction, and the appellants excepted. There was no proof of H. Marshall's authority to act as agent for J. M. Marshall, and H. Marshall himself swore he had no such authority. The motion was, therefore, properly overruled.

Relinquishment to the state, by person asserting himself agent, not operative upon holder of title unless agency proved.

III. The circuit court overruled a motion for a new trial, and the appellants excepted.

The proof justified the verdict. The statute of limitations did not apply. The alleged surprise at the rejection by the court of a copy from the sur-

Alleged surprise at the rejection of a copy of a writing, not evidence competent to

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prove a fact,  
not such sur-  
prise as would  
justify a new  
trial.

veyor's book furnished no cause for a new trial—1st. because such surprise would not be, in itself, sufficient—and 2nd. because the copy, if it had been admitted, could not have had any legitimate tendency, in the remotest degree, to defeat the action.

Wherefore the judgment must be affirmed.

*Sanders*, for appellants; *Brown*, for appellee.

EJECTMENT.

## Harle vs. McCoy.

Case 102.

Error to the Mason Circuit; ROPER, Judge.

*Ejectment. Executory contract for land. Tenant. Wrong doer. Trespasser. Right of possession.*

May 3.

Chief Justice ROBERTSON, delivered the opinion of the Court.

THIS appeal is prosecuted to reverse a judgment obtained by the appellee, (in consequence of an instruction by the court to the jury, that the facts proved entitled him to a verdict,) in an action of ejectment to recover from the appellant a lot in the town of Dover.

The demise was laid on the 1st of May, 1830, and the only proof on the trial, (as we feel authorized to infer from the tenor of the bill of exceptions,) was that, in the winter of 1829–30, McCoy sold the lot to Harle, and gave his bond for the title; that Harle forthwith took possession under the contract, with the assent of McCoy; was to pay the price in two instalments, the first in March, 1830, and the last one year after the date of the bond.

Harle offered the bond, (dated January 11, 1830,) as evidence; and also offered to prove a tender of the first instalment; but was overruled by the court.

He who enters upon land under the title of another is estopped to deny such title.

The legal deduction from the foregoing facts, is, that as the appellant entered under the appellee, he is thereby estopped to deny his title, or require any other proof of its validity. But it does not necessarily follow, (as the circuit court seems to have thought it did,) that the appellee had a right, without any other proof, to a verdict in this suit.

He who enters upon land under an

There is no fact in the record tending in any degree to prove that the appellant was a trespasser, or

that his possession had, by any act or omission by him, become tortious in fact, or in contemplation of law. It does not appear that he had renounced the contract, or refused to fulfill it, or denied the appellee's title, or had, in any way, been disloyal to the relation which the contract had created; nor does it appear that the appellee had ever demanded restitution, or done any act equivalent to such a demand. It seems, therefore, that the possession of the appellant was, at the date of the demise, as it was when first taken, lawful, and that consequently he should not be deemed a quasi trespasser and subjected, as such, to the vexation, costs, and damages incident to an action of ejectment, which can be maintained only against a wrong doer.

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executory  
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purchase,  
cannot be  
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sion into a  
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session; as  
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the title of  
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cient notice  
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money will  
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cient.

He was not a tenant from year to year. He was not even a tenant at will or at sufferance, according to the technical import and consequences of tenancy; because there was no contract of lease, express or implied, and no action for rent nor for use and occupation, could be maintained against him. He entered under color of title, and not as tenant. Roberts on Frauds, 147; Strange, 783; Smith vs. Stewart, VI. Johnson's Reports, 48; Bancroft vs. Wardwell, XIII. Ib. 490.

Nevertheless, it seems to be the settled law in England, established, not by any modern statute inapplicable here, but upon principles of reason and right, which should prevail every where, that a bona fide occupant, who entered under an executory agreement for purchase, cannot be evicted as a trespasser, in an action of ejectment by his vendor, without a notice to quit, or demand of possession prior to the date of the demise, or unless he shall, before that time, have done something which, by operation of law, converted his possession from a lawful to a tortious one. See III. v. Starkie on Ev. 1612; Sugden on Ven. I. Am. Ed. 174; Adams on Ejectment, Tillenghast's Ed. 103-6-17; II. Wheaton's Selwyn, 531; II. Chitty's Blackstone, 150, and. n. 14.

The same doctrine is recognised in some, if not all, of the states of this Union. It has been repeat-

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edly recognised in New York. See *Smith vs. Stewart*, supra; *Jackson vs. Rowan*, IX. Johnson, 330. *Jackson vs. Kingsley*, XVII Ib. 158.

None of these dicta or cases are authoritative here, but they tend persuasively to show what the law is or ought to be in this state, as well as elsewhere; and as we know of no authority to the contrary, and the doctrine seems to be reasonable and just, we feel authorized to declare it to be the law of Kentucky.

Ejectment cannot be maintained against one who entered legally, and has done no act, by which his possession has become wrongful. It can only be maintained against a trespasser or quasi trespasser.

Bond for title competent evidence in ejectment by vendor or vendee, to show the nature of vendee's possession.

The appellant, having entered under a lawful title, cannot be deemed a trespasser without proof of some wrongful act. The law will not presume that his possession had become unlawful, and hence reason and analogy seem to forbid, that he should be subjected to a suit for a wrong of which he had not been guilty, in fact, or by construction of law, unless he had refused to surrender on a sufficient demand or notice to quit, or had been guilty of some positive act which rendered his retention of possession wrongful in fact, or in contemplation of law; such, for example, as a denial of the appellee's title, or a disavowal or renunciation of the contract; a mere failure to pay would not, of itself, be sufficient.

Wherefore, as the instruction given to the jury by the court, was inconsistent with the foregoing doctrine, the verdict and judgment are erroneous.

It also follows, as a corollary, that the circuit court erred in rejecting the bond for a title; because it was the best evidence of the terms under which the appellant had entered and held.

Judgment reversed, verdict set aside, and cause remanded for a new trial.

*Reid* and *Depew*, for plaintiff; *Brown*, for defendant.

**Trotter vs. Sanders et al.**

Error to the Franklin Circuit; Todd, Judge.

*Instruction. Non suit. Jury.***EJECTMENT.****Case 103.****May 3.**

Chief Justice ROBERTSON delivered the opinion of the Court.

**THIS** is an ejectment. The lessor having proved title, on the trial, the defendants proved facts *conducting* to show that they had entered and continued to hold under executory contracts of purchase from the lessor: and thereupon the circuit court instructed the jury to find as in case of a non-suit, because the plaintiff had not proved any notice to quit prior to the institution of the suit; and a verdict and judgment were rendered for the defendants accordingly.

When facts conducting to conclusion are given in evidence, it is error in the court to instruct the jury peremptorily. It belongs to the jury to decide.

As the jury, and not the court, had the right to ascertain the fact of sale, and of entry and possession under it, and as the plaintiff had not proved or admitted that fact, the court erred in giving a peremptory instruction to find for the defendants.

Wherefore, though the principle recognized in the instruction may be correct, the judgment must be reversed and the cause remanded for a new trial.

*Monroe and Morehead*, for plaintiff; *Haggin and Sanders*, for defendants.

**Talbott vs. McQuies.**

Motion from Garrard

**MOTION.****Case 104.****May 3.**

**THE** court having, at the present term, affirmed the decree of the court below, and awarded damages against the appellants, the appellees, by their attorney, applied to the clerk of this court for an execution for the damages, but he refused to issue it, and they moved the court to instruct the clerk to issue it.

The court refuse to order execution from their clerk's office to enforce their judgment or damages, but remand the case to the court below to be executed.

*By the Court.*—We understand that the practice has been, ever since the organization of the court, to remand the cause to the court below to be executed; we see no reason for changing the practice.

**Motion overruled.**

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## COVENANT.

## Hart vs. Burton,

Case 105.

Error to the Mercer Circuit: KELLEY, Judge.

*Conditional sale. Mortgage. Pawn or Pledge. Redemption. Construction.*

May 3.

Chief Justice ROBERTSON delivered the opinion of the Court.

THIS is an action of covenant brought by Charles Hart, against Charles F. Burton, on the following writing: "Borrowed from Charles Hart Senr. \$275, for which I have placed in his hands as security, a negro girl: should I not pay said sum of money by the 20th inst. the said girl is to be the absolute property of said Hart, and I bind myself to give a bill of sale when demanded.

(Signed) C. F. BURTON."

"Feb. 9th, 1827."

The declaration averred that the slave had died in April, 1827, without the plaintiff's fault, and charged, as a breach of the covenant, the non-payment of the \$275 on the 20th of February, 1827, or since.

The circuit court, being of opinion that covenant could not be maintained, sustained a demurrer to the declaration, and thereupon gave judgment in bar of the action.

In revising the judgment, two questions are presented for consideration: 1st. Does the writing import a conditional sale, or only a pawn or mortgage? 2d. If the legal effect of the contract be only a security for the repayment of money loaned, is there any covenant to pay the money on the 20th of February, 1827? These are legal propositions, and therefore must be decided at law, as they should be in equity, according to the actual import of the writing, when tested by the fixed rules of law and reason.

When a writing states the delivery of a conditional sale. The parties, and especially the plaintiff, may have intended that the contract should become a sale on the non-payment of the \$275 within the eleven days allowed for the reimbursement of the loan. But as the writing states and that the consideration to be a loan of money, and shows expressly, that the slave was delivered to the lender,

as a collateral security, the contract, according to legal intendment, is a pawn or mortgage. It was certainly so at, and immediately succeeding its completion; and the maxim, "*once a mortgage always a mortgage*," is as legal as it is equitable, and applies to all collateral securities, as well to mere pledges as to technical mortgages: See Edrington vs. Harper, III. J. J. Marshall's Reports, 358, and Brown vs. Belmont et al. VIII. Johnson, 25.

It is not material whether this be a mortgage or a pawn. The right of redemption attaches equally to both, and it is as difficult to transmute the one as the other into a sale, by the operation of the original contract. Though anciently at Rome, the creditor and debtor were permitted, by the *lex commissoria*, to make an agreement at the date of the pledge, whereby it would, on a prescribed contingency, become the absolute property of the pawnee; such a power was not indulged, even at Rome, since the days of Constantine, who abolished the law by which it had been sanctioned. Every agreement for preventing redemption of pawns is proscribed by the common law as emphatically as are similar agreements in mortgages of real estate. Wherefore, whether the contract in this case be deemed a pledge or a mortgage, the same rules of law apply to it, and produce the same effect. The same contract, which made the slave a pledge for money borrowed, did not, *proprio vigore*, make her the absolute property of the pawnee or mortgagee. If it were *ab origine*, a pledge or mortgage, it continued to be so; and whatever may have been the actual intentions of the parties, the deduction of law from the fact of loan and of security, is that the contract was not a sale, but a pledge or mortgage only.

Burton might surely have redeemed, even after the eleven days; and as he had the right to redeem, Hart had correspondent rights, and may maintain a suit for his money without attempting a foreclosure. We cannot admit that, if one party had a right to treat the contract as a mortgage, the other shall not have a similar right; their rights must be equal and reciprocal. The contract is a mortgage or not a mortgage as to both parties. If the contract be

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lender as a collateral security, the contract is a mortgage or pawn.

The right of redemption attaches equally to pawn and mortgage, and "*once a mortgage always a mortgage*," is not more true, than once a pawn always a pawn. The common law recognizes no agreement for preventing the redemption of pawns.

Where one party has a right to redeem, the other has a right to sue for his money; the death of a slave mortgaged or pawned.



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without culpable conduct on the part of mortgagee or pawnee, does not affect that right.

The words ~~should I not pay said sum of money by the 20th inst. in an instrument, specifying the subscriber had "borrowed" the money, constitute an express covenant to refund the money.~~

Any words which evince an agreement will constitute an express covenant when inserted in a specialty.

considered a mortgage, the death of the slave did not affect the mortgagee's right to sue for the money loaned. If it be a pledge only, the death did not affect any legal right which otherwise he may have had to sue for the amount loaned, unless the death resulted from his culpable negligence, or was occasioned by his improper conduct; and the declaration negatives any such delinquency.

II. The writing imports a covenant to pay the \$275 on the 20th of February, 1827. As the contract was not, according to its legal operation, a sale, a contract to refund the money must be presumed; and we are of opinion that such a contract is expressed by the writing itself, when properly construed. There is no covenant, *in totidem verbis*, to pay \$275 on the 20th of February, '27, or at any other time. But the words, when sensibly and practically interpreted, clearly import a covenant to pay the money which was loaned. And as language expresses that which is *rightly understood* by it, the effect, if the writing in this case, when properly understood, means that the money was to be refunded, there is, of course, an *express covenant* to that effect.

Any words which, literally or constructively, evince an agreement, will amount to an agreement, and will, of course, be an express covenant when inserted in a specialty. Hence a recital (in a deed) of an agreement, will amount to an express covenant, because it is an acknowledgement, by deed, of the existence of such agreement. So too, a similar acknowledgement of a sale of land would be deemed an express covenant to convey the legal title, because the act of selling carries with it, as a natural and usual consequence, an obligation to make a title. The principle is plain and its application is easy; we shall, therefore, not exemplify further: See *Wheatons Selwyn*, 343-4; *Ba. Ab. Govt. B*; *Beal's adrs. vs. School's exr. I. Marshall*, 476.

"Borrowed" import an obligation to return the thing borrowed or its value.

"*Borrowed*" imports necessarily an obligation to return the thing borrowed, if it be loaned for use, or to return its kind and value if it be loaned for consumption. Therefore, according to authority, analogy and reason, as the word "borrowed" in the

writing signed by the defendant, imports an acknowledgement by him, that he had agreed to refund the amount borrowed, or was under a legal obligation to do so, the writing contains an express covenant to pay it at the time designated, to-wit: the 20th of February, 1827. "This is to witness that I have borrowed £10 from C. D." (Signed) A. B., is a covenant to pay the £10. Ba. Ab. Covt. B.

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"Implied" covenants apply only to real estate. But there is no analogy between them and such as this. They are covenants which are not inferred from the words, according to their popular or grammatical import, but are deduced by operation of law as arbitrary, and merely legal consequences, flowing from certain technical terms which do not, of themselves, in their common use, mean what they are thus made to imply; for example, the law implies a warranty from the words "demise and grant," when used in a lease, though they, in fact, no more import a warranty than "sell and convey" would in a deed, bargain and sale.

Implied covenants are legal inferences from technical terms, applied to real estate; a covenant which words import according to their ordinary signification and grammatical use, is an express covenant.

A covenant which the words import, when understood according to their common practical or grammatical signification, is not an "implied," but is an express covenant. Such is the covenant in this case; for if, as we have decided, the contract was not a conditional sale, the consequence seems not only rational, but almost inevitable, that it contains a covenant to refund the money which the word "borrowed," *ex vi termini*, imports.

Wherefore, it seems to this court, that the circuit court erred in sustaining the demurrer to the plaintiff's declaration; and therefore, the judgment is reversed and the cause remanded for further proceedings consistent with this opinion. †

Cunningham, for plaintiff; Harlan, for defendant.

Judge UNDERWOOD delivered the following dissent from the opinion of the Court.

IN this case I think the circuit court correctly sustained the demurrer to the plaintiff's declaration. According to the contract between the parties, if Burton did not repay the borrowed money on or before the 20th of February, the negro girl became

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"the absolute property of Hart, and Burton bound himself to give Hart a bill of sale at any time afterwards, when called on." The negro died in April in the possession of Hart, to whom she was delivered as a pawn in the first instance, and now he wants to throw the loss on Burton, contrary to the express stipulation in the contract, that the negro was absolutely his from and after the 20th of February. He does not pretend, in his declaration, that he called on Burton for a bill of sale, and that he refused to execute it. It does not appear, therefore, that Burton has violated his contract in any respect, unless it can be shown that it was his duty, contrary to the express provisions of his contract, to return the money which he had received; in other words, to pay for a slave which died the property of Hart. Why shall he be made to pay in direct opposition to the contract? No reason can be assigned for it, unless it be, that the contract should be regarded as a mortgage, to which an equity of redemption was attached in favour of Burton, and which would enable him to redeem, at any time, notwithstanding his express covenant, that the slave should be the absolute property of Hart, and that he would confirm the title by bill of sale if required, in case he did not pay the money on the 20th of February. It is not possible that the parties could have shown more clearly than they have done, an intention on the part of Burton, to make his pawn irredeemable, in case he did not pay the money on the day. Burton is not asserting any right to redeem, and it is not necessary to decide, whether he would be estopped by the terms of his deed, to assert such a right. However that may be, I am clear Hart has no right to claim a return of the money that advanced. He stipulated to take an absolute title to the slave, unless the money was paid him on a named day. He did get such a title by the terms of the contract. If he feared it was not sufficient, it was his duty to call on Burton for a confirmation of it. He failed to do this, waited till the slave died, and now wishes to evade so much of the contract as gave Burton the right to confirm his title, if any confirmation was necessary.

The equitable right to redeem pawned or mortgaged property, contrary to the stipulations of the contract, is an innovation by the chancellor, upon the doctrines of the common law. It was designed to prevent the hardships and oppressions which usurers and money lenders were in the habit of inflicting upon those whose needy circumstances required the use of money. Now, I think the reasons upon which this whole doctrine is founded, show that Hart has no right to avail himself of the doctrine in this case. If he lent \$275 and took possession of the slave as a pawn to secure its return, and the services of the slave were worth more than the interest of the money, he was guilty of violating the law, as a usurer. That the services of the slave were at least equal to the interest, and that the one was to be set off against the other, I infer from the fact, that there is no stipulation to pay interest in the contract. That the slave was equal in value to the sum advanced, I infer from the fact, that Hart accepted her as ample security, and showed an anxiety by the terms of his bargain, to make his title absolute. I, therefore, say to Hart, the doctrine of redemption does not apply in *your* behalf. The object of that doctrine is to shield the necessitous from oppression, and it shall not be perverted to enable you to throw a dead negro, contrary to your contract, upon the hands of the borrower of your money; when if the negro had lived, you would have used the contract to prevent a redemption, and would have reproached Burton with meanness, if he had failed to execute the bill of sale upon request. The doctrine of redemption shall not be a sword in your hands. I would, therefore, in all cases like this, hold the lender to his bargain. There is no usury or oppression operating upon him, which would justify the chancellor's interposition in order to restrict the rigour of the common law rule; much less can I perceive any principle of the common law, which can justify a recovery, in an action at law, directly in the face of the contract, and in contravention of it. Here the parties have agreed, on a certain event, that the money shall be Burton's and the slave Hart's absolute property. Yet by the opin-

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ion overruling the demurrer, the common law judge is made to decide, that Burton shall not have the money, nor shall the slave be Hart's absolute property; thus setting aside the contract made between the parties, and substituting by implication, a new contract in opposition to it.

The contracts of men should be respected and enforced in courts of justice, according to the intention of the contracting parties, unless they be *malum in se, malum prohibitum*, or contrary to some settled principle of public policy. Now I cannot perceive any thing in the contract between Hart and Burton positively vicious, nor am I acquainted with any principle of law which prohibits the making of such a contract. There is a principle of policy, I admit, which has secured to mortgagors and pawners the right to redeem, and in the ordinary cases of mortgages and pawns, I grant, that there should be reciprocity in the rule; and whenever in such cases, the mortgagor or pledger could redeem, the mortgagee or pledgee should have his money, notwithstanding the destruction of the thing mortgaged or pledged. In such cases as these, the mortgage or pledge is no more than a security for the money lent. But in the present case it is perfectly obvious that the parties intended something more than a mere security. They intended a sale, upon condition the money was not paid on the day. Is it true then, that once a pawn, always a pawn; once a mortgage, always a mortgage? Shall the plaintiff, Hart, avail himself of any such maxim, to change the character of the contract from what it so obviously is, and thereby convert an absolute into a redeemable estate? So far as considerations, drawn from public policy can influence the case, (and it should be remembered that such considerations gave rise to the right to redeem.) I am satisfied they are all against Hart, and I do not admit that the maxims alluded to are applicable in his behalf. In Bacon's Abridgement, Title mortgage, letter B., many cases are stated, where, if the money is not paid within a *time limited*, the estate becomes absolute, and I observe in some of the cases the grantor stipulated against his right in equity to redeem the premises in

case he failed to pay on the day. I do not see it noticed by the court, and such stipulation declared illegal or inoperative. I moreover notice in these cases, that the want of a covenant on the part of the mortgagor, binding himself to repay the money advanced, is a strong circumstance to prevent him from asserting a right to redeem where he fails to pay the money on the day. Now the opinion has deduced a covenant to pay, in this case, from the acknowledgement by Burton, that he "*borrowed*" the money. If there was nothing upon the face of the contract incompatible with the deductions made in the opinion, I am not prepared to say that, these deductions would be objectionable in an ordinary case of *borrowing* money, and the execution of an instrument merely acknowledging that fact. But when, as here, the covenant is to execute a bill of sale upon request, confirming the title, in case the money is not paid within the limited time, it does seem to me that the idea of an obligation or covenant to return the money is completely negatived. It is excluded by the stipulation to do an act incompatible with it; and yet my brethren have made Burton covenant to repay the money.

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I therefore look upon this case as falling within the principles recognized in *Floyer vs. Livingston* 1 P. Williams 268, *Miller vs. Less*, 2 Atk. 494, *Tasbury and McNamara vs. Ecklin &c.* 4 Brown's Parl. Ca. 142, in all of which the right of the mortgagee to pay a consideration for and to stipulate against the assertion of an equity of redemption, was recognized. In those cases lapse of time constituted a consideration hostile to permitting redemptions. I cite them to show that there is nothing illegal in contracting to surrender the right to redeem *real estate* much less is there any thing objectionable in such a contract in relation to a chattel.

In Jacob's law dictionary, title Power, it is shown that there are cases where the pawn cannot be redeemed. Strange, 919, is cited for this principle "where money is lent on a pledge, the borrower is personally liable to the payment, unless there be an agreement to the contrary." Such agreement ex-

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ists in this case, according to my understanding of the transaction, and therefore Burton is not personally liable, as the opinion decides.

## APPEAL.

**Brasfield vs. Baugh &c.**

Case 106.

Error to the Madison Circuit; FRENCH Judge.

*Practice. Appeal Bond. Parties. Jurisdiction.  
Time.*

May 4.

Judge UNDERWOOD delivered the opinion of the Court.

Too late to object that one of several against whom justice has rendered judgment, failed to unite in appeal bond, to the circuit court, after the case has been tried in circuit court, and in the court of appeals and remanded.

THIS cause was before this court, and an opinion delivered in December, 1890, reversing the judgment of the circuit court. Upon the return of the cause the circuit court dismissed the appeal, on motion, because Adams, against whom and Brasfield the judgment had been rendered, jointly, by the justice, did not unite in executing the appeal bond. We do not deem it important to decide whether one of two or more defendants against whom a justice of the peace has rendered a joint judgment, could separately prosecute an appeal to the circuit court, prior to the passage of the act of the 31st December, 1831, which expressly provides for the case. However we might decide the point, if made in proper time, we are clear that Baugh &c. delayed making it in this cause until it was too late. A trial took place in the circuit court, then in this court without objection in consequence of Adams having failed to unite in the appeal bond. Both parties had staked their case upon the merits, and therefore we think it was erroneous to permit them to go back and take exceptions to the regularity of the proceeding when for any thing which appears to the contrary, Baugh &c. have a security upon the appeal bond filed, in case they ultimately succeed.

Wherefore the judgment of the circuit court is reversed, and the cause remanded for proceedings in conformity to this opinion.

The plaintiff in error must recover his costs.

Caperton, for plaintiff; Turner, for defendant.

**Sprague vs. Sprague &c.**

CHANCERY.

Appeal from the Union Circuit; McLEAN Judge.

Case 107.

*Chancery practice. Non-resident defendant. Order of publication.*

Judge UNDERWOOD delivered the opinion of the court.

May 4.

WILLIAM SPRAGUE filed his bill against John Sprague and Dunning McNair for the purpose of collecting from John Sprague, a resident, a debt which he owed McNair, a non-resident, alleged to be insolvent, and against whom William Sprague asserted a claim. Pending the suit McNair died, and there was an attempt made to revive it against his representatives. The order of publication against them is insufficient because certified by an editor instead of printer as required by the statute. But the persons named in the bill of revivor as administrators, filed their answer, admitting the right of the complainant to recover. There is no proof, however, that they are the administrators of McNair, and if the filing of the answer was sufficient to cure the illegality of the order of publication as certified, still if it be indispensable that it should have been proved that they were administrators, the decree must be reversed.

Order of publication is required to be certified by the printer not the editor of the paper.

Answer put in waives irregular authentication of order of publication.

Judge Underwood thinks that the complainant was bound to show, before he was entitled to a decree, that D. R. McNair and Scott were really the administrators of D. McNair, and, notwithstanding the bill of revivor against them as administrators was not answered by John Sprague. Whether they were or were not administrators was a fact which cannot be presumed to be within the knowledge of J. Sprague, and as he had an answer in, denying his liability altogether, Judge Underwood thinks it was the duty of the complainant to file the record of their qualification. But the chief justice and judge Nicholas are of opinion, that as John Sprague failed to answer the bill of revivor, though filed subsequent to the time his answer was put in to the original bill, that the facts stated in the bill of revivor should be taken as admitted by John Sprague, and therefore it sufficiently appears that, D. R. McNair and Scott were the administrators, and as they filed

If party fail to answer bill of revivor vs. A. B. as administrator of a defendant to original bill and A B answers as administrator, the fact must be considered as admitted by him failing to answer.



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their answer, it cured the defect in the authentication of the order of publication.

The whole court is of opinion that, the heirs of D. McNair were not necessary parties, and that John Sprague owed at least as much as has been decided against him.

Wherefore, the decree must be affirmed with costs and damages.

*Crittenden*, for appellant; *Brown* for appellee.

TRESPASS.

### Prewit vs. Walker.

Case 108.

Error to the Mercer Circuit; KELLY Judge.

*Justification by sheriff under fieri facias. Statute exempting property from execution. Pleading. Trial of right of property by jury.*

May 5.

Chief Justice ROBERTSON delivered the Opinion of the Court. PREWIT sued Walker in trespass for taking and converting a horse.

Walker justified as a deputy sheriff—averred that he levied a fieri facias (in his hands against Prewit) on the horse—that it was subject to the execution—and that a jury, empannelled to try the right of property, having decided that the horse was subject to the execution, he sold it in virtue of the process.

Prewit replied that he was, at the date of the levy, a farmer by occupation and a *bona fide* housekeeper, and that the horse which Walker had sold was his only “work beast.”

A demurrer to the replication having been sustained, and Prewit having failed to plead over, judgment was rendered in bar of his action. To reverse that judgment this writ of error is prosecuted.

If the replication had contained such averments as to show that the horse was exempt from execution, it would have been good; for the statute of this state regulating the trial of the right of property, under execution, applies only to a case in which a stranger to the process claims the property; and according to the common law, such a verdict as that

Statute authorizing trial of right of property under execution, *en pais*, only applies, when claimed by stranger.

Replication, that plaintiff was a “house keeper” and

set forth in the plea filed by Walker, could not have justified his sale of the horse.

But the replication does not show that Prewit had a family—and the statute of 1828 (session acts 151,) which exempts certain kinds of property from execution, declares that its provisions “shall not be construed to extend to any but actual bona fide housekeepers *with a family*.” Therefore the replication it insufficient.

The plea is, in our opinion, substantially good. It sufficiently avers, we think, that the horse was taken in virtue of the execution and whilst it was in full force.

Wherefore, the judgment of the circuit court is right, and must be affirmed.

*Harlan*, for plaintiff; *Cunningham*, for defendant.

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that the horse levied on and sold by sheriff was his “only work beast” not good answer to justification for taking and selling in virtue of *feri factas* vs. plaintiff in trespass. It should aver that he was “an actual bona fide house keeper with a family.

## Kincaid vs. Hocker.

Appeal from the Lincoln Circuit; BRIDGES Judge.

*Joint borrowers of money. Reciprocal responsibility. Insolvency. Apportionment.*

Judge UNDERWOOD, delivered the Opinion of the Court.

On the 9th of January, 1827, W. C. Barnett, A. Hocker and J. Kincaid executed their joint and several note to Burgess, for \$800. Barnett dying insolvent, and Hocker having paid a great part of the debt and replevied the balance, filed his bill against Kincaid, for contribution, alleging that they were co-sureties. The court decreed \$340 against Kincaid, and he has appealed. Two grounds are assumed for the reversal of the decree: first, that the allegations of the bill are insufficient: Second, the facts proven show that Kincaid is not liable.

Upon the first point, we deem it useless to comment, because it appears that Hocker has paid the debt, and upon the return of the cause, leave may be given him to amend his bill by averring the fact.

Upon the second point, we admit there is some doubt. Without going into a detail of the various acts, and then comparing, reasoning, and stating de-

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row money  
jointly, but  
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individually  
unequal sums.  
The benefit,  
to each, is  
according to  
the amount  
appropriated  
by each, in  
the event of  
the insolvency  
of either,  
the loss  
should be sustained by the  
solvent partners in the  
proportion  
of the sum  
employed by  
each for his  
own use.

ductions, we shall content ourselves with giving the result. We think Barnett Hocker and Kincaid associated to borrow the \$800 advanced by Burgess, agreeing among themselves that Kincaid should have for his separate use \$100, and that the balance should be equally divided between Barnett and Hocker, giving to each \$350. It was a partnership concern to obtain the money of Burgess. All were to be bound to him, but they were to divide it out among themselves in the proportions stated. The parties stood as principals in the note to Burgess for the portions of the money severally received by them. Barnett failed. The \$350 which he should have paid therefore becomes a charge upon Hocker and Kincaid, owing to Barnett's insolvency, and the question is how they ought to divide the loss. The benefit resulting to the associates from borrowing the money, was in proportion to the sums they severally received out of the amount borrowed, and therefore the loss occasioned by the insolvency of either partner, should be borne by the solvent partners in the same proportion. This principle is applied by Pothier, in his treatise on obligations, vol. 1 174, to cases like the present, and we regard the rule as based upon the purest equity.

It results that Hocker should pay seven ninths of the \$350, which Barnett was bound for as principal, in addition to the \$350 received by him, and that Kincaid should pay the remaining two ninths of Barnett's \$350, in addition to the \$100 received by him.

The court decreed against Kincaid much more than he is chargeable with according to this rule.

Wherefore the decree is reversed, with costs, and the cause remanded for proceedings not inconsistent herewith.

The chief justice is of opinion, that the proof shews that Kincaid was principal to the extent of \$100—and that Hocker and Barnett were principals, and Kincaid their surety, for the residue, to wit: \$700: and that, therefore, he should not be required to contribute any part of the latter sum for which he was only Hocker's security.

*Brown* for appellant; *Owsley* for appellee;

**Bryan vs. Buford.**

COVENANT.

Error to the Bourbon Circuit; FRENCH, Judge.

Case 110.

*Indemnity. Partners. Pleading. Duplicity. Special demurrer.*

Chief Justice ROBERTSON delivered the Opinion of the Court. May 7.

THIS is an action of covenant brought by William Buford, against George Bryan and Pierson M. Bryan for an alleged breach of their covenant to indemnify him against all liability resulting from debts which had been previously incurred by himself and the said Pierson M. Bryan and Willis N. Bryan as partners in trade. The breach alleged was the non-payment, by the covenantors, of a note which the partners, prior to the date of the covenant, had executed to one William Scott, and the subsequent payment of it by Buford, in consequence of the imputed delinquency of the covenantors. Buford obtained a judgment in damages against George Bryan.

Various errors have been assigned; but we shall notice two of them only.

I. By a plea, no. 5. the defendants in the action pleaded, among other things, that Buford had not, as he had averred, paid the amount of the note to Scott: and the circuit court sustained a demurrer to that plea. In this the circuit court erred, since the abolition of special demurrers, duplicity does vitiate a plea. Since the abolition of special demurrers, duplicity does vitiate a plea.

is not fatal. Therefore, if the fifth plea, though it may be double, contain any available matter in bar of the action it is good on demurrer. As the covenantors undertook to indemnify the covenantor against a preexisting liability to suit, there was no breach of the covenant unless Buford had been sued by Scott, or had actually paid to him the amount of the note or some portion of it (see *Lewis et al. vs. Crocket*, III. Bibb 196.) Therefore the plea, averring that he had not paid Scott, was a full and effectual response to the alleged breach, and was a good plea. Covenant to indemnify against pre-existing liability to suit, not broken, unless covenantee be sued, or actually pay the whole or some part of the debt.

II. On the trial, Buford was permitted to read, to the jury, an endorsement on Scott's note, purporting to be a receipt by him to Buford, for the amount of the note. As the suit was brought in Buford's Endorsement on a note of payment by plaintiff in an action of co-

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venant where the defendant's liability depends on the fact of plaintiff's having paid, not evidence unless its genuineness be proved.

name, for Scott's benefit, and as there was no proof of the genuineness of the receipt, or other proof of the alleged payment to Scott, the endorsement on the note was impertinent and illegitimate as evidence.

Wherefore, the judgment of the circuit court against George Bryan, must be reversed, and the cause remanded for a new trial, and with instructions to overrule the demurrer to the fifth plea.

*Brown* for plaintiff; *Marshall* and *Hanson* for defendant.

#### ASSUMPSIT.

### Lewis vs. Grimes.

Case 111.

Error to the Jessamine Circuit; K. L. V. Judge.

*Assumpsit for the purchase money for land. Statute of frauds and perjuries.*

May 7.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Vendor who has conveyed or covenanted to convey land may maintain assumpsit for the purchase money. Statute of frauds and perjuries does not apply to the promise to pay the consideration; but to the contract for value of land.

THIS is an action of assumpsit, for \$2,000 averred to be part of the consideration promised by Grimes to Lewis, for a tract of land, which the latter had covenanted to convey to the former.

Grimes (admitting that the contract for the sale and conveyance of the land was in writing and signed by Lewis, the vendor) pleaded that his assumpsit for the \$2,000, was not in writing, and therefore (as he supposed) could not be enforced by suit. A demurrer to the plea having been overruled, judgment was rendered in bar of the action.

The application of the statute of frauds and perjuries to the assumpsit for the consideration, is the only matter presented to this court for revision.

An assumpsit to pay for land is not a "contract for the sale of land." Neither the letter, policy nor object of the statute of frauds and perjuries, should be deemed to embrace or apply to a promise, express or implied, to pay for land which the vendor had conveyed or covenanted to convey. If the contract of sale had been merely oral, and therefore invalid in law, the assumpsit for the price, even if it had been in writing, would not have been binding, for want of consideration. But, surely a conveyance of land

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or a covenant to convey land, would be a legal and sufficient consideration for a binding promise to pay its actual or conventional value. Such a promise, upon such a consideration, is not, in our opinion, within the statute of frauds and perjuries—(See II Vol. Sanders on pleading, 903;) and such seems to have been, virtually, the decision of this court in the case of *McDowell vs. Delap* (II Marshall 33.) That was an action of assumpsit, by a vendor of land against his vendee, for the price. The defendant succeeded, as he ought to have done, because there was no written memorial of the sale, and because, therefore, there was no legal consideration for the promise to pay the stipulated price. But, in the opinion delivered, this court said that, as the contract of sale was not obligatory on the plaintiff, “such an agreement was consequently, not a sufficient or valid consideration—for the promise on the part of the defendant;” and also that “it was certainly necessary to produce in evidence some memorandum in writing of the agreement signed by the plaintiff or some one duly authorized by him.” Here is a plain intimation that, if the plaintiff, who was the vendor, had been bound by a proper memorandum in writing, he could have maintained assumpsit against the vendee for the promised price, even though the defendant had signed no memorandum in writing; and the record in the case of *Hopkins vs. Alvis* (II Marshall, 374) shews that the same point, was involved and was necessarily decided, judicially and expressly, in the same way.

Wherefore, it is the opinion of this court, that the plea relying on the statute of frauds and perjuries presented no bar to the action, and that, therefore, the circuit court erred in overruling the demurrer to it.

Judgment reversed, and cause remanded, with instructions to sustain the demurrer to the plea.

*Hewitt*, for plaintiff; *Mayes*, for defendant.

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DETINUE.

**Franklin, Administrator &c. vs. Hart.**

Case 112.

Appeal from the Fayette Circuit; HICKEY Judge.

*Release. Specific performance. Chattel. Construction.*

May 7.

Judge UNDERWOOD delivered the opinion of the Court.

Judge Nicholas did not sit in this case.

ELI CLEVELAND conveyed by bill of sale to Levi Hart, a number of slaves. The wife of Cleveland united in the conveyance for the purpose of barring the rights of her heirs, who it was apprehended, would be entitled to the slaves after her death. There was a reservation of a life estate to Cleveland and wife, upon the face of the bill of sale. It seems that Cleveland had sold and delivered sundry slaves to others, before the execution of the bill of sale to Hart, and that he included the slaves so sold in the bill of sale to Hart.

Shortly after the execution of the bill of sale, Hart endorsed upon it, at the instance of Cleveland, a release to the following effect, and which was admitted to record, the bill of sale having been recorded: to-wit: "This certificate of release, witnesseth, that whereas the within Eli Cleveland, hath heretofore sold and legally conveyed away many of the negro slaves therein specified as conveyed by him and his wife, to me by deed of indenture, bearing date the 15th day of November, 1819. Now, I do hereby agree for myself, my executors, administrators or assigns, to release and forever quit all claims derived to me by the aforesaid and within conveyance, and do now release and forever quit claim against the said Eli, his heirs, executors, administrators or assigns, for all such negroes in the within deed specified, or their values as have before the date thereof, been so sold and legally conveyed by said Cleveland to any person whatever. Witness &c."

Construction given to the certificate of release, by which it supposed to be executed in part and in part execut-

seems to have been entirely overlooked, that the release by Hart was susceptible of a construction which would embrace the slaves that were possessed by Cleveland, as well as those which he had previously sold. "I do hereby agree for myself, &c. to release, and forever quit all claims derived to me by the aforesaid and within conveyance," is very comprehensive language,

and embraces all the slaves mentioned in the bill of sale, whether they were in the possession of Cleveland, or whether they had been sold. If the release stopped with this sentence, there could be no doubt, that Hart had agreed to give up all claim whatever to all the slaves, and that it was his duty to execute a formal release, presently. Is this construction limited and restricted by any thing apparent on the face of the release? We think it is not. The following clause, beginning with the words "*and do now release*" &c. proves that Hart made an immediate surrender of his title derived under the bill of sale to the slaves which Cleveland had theretofore sold. This does not restrict the meaning of the language going before. It merely executes the contract so far as the slaves which Cleveland had sold were concerned, and leaves the contract in relation to the slaves which Cleveland had in possession as executory, thereafter to be perfected by the execution of a release. Unless this construction prevails, the first clause is without meaning and should not have been inserted. We cannot say that it was inserted through mistake by Hart, and that he did not foresee the effect it might have, and consequently, that it should be disregarded.

It does not appear that Hart has ever executed a release for the slaves which Cleveland retained in his possession, and it may be urged, that if the contract remains executory, he ought still to recover. Not so. A contract not fully executed, may vest such a right to the chattel contracted for, as will maintain the action of detinue. *McDowell vs. Hall*, 11 Bibb, 610. Here Hart agrees to release all claims derived to him under the conveyance. It is an acknowledgment that he has no right, and that the right, is with Cleveland. As slaves pass as chattels, and as Cleveland retained the possession, we think Hart should not have been permitted to recover, when he had agreed to release all claims, merely because he had not performed his agreement, on the institution of his suit.

The chancellor might refuse to compel a specific performance of the agreement, because it related to a chattel. An action at law, might be unproductive.

FRANKLIN  
Adm'r &c.  
vs.  
HART.

ry. See release and  
quere as to  
the construction.  
Rep.

Plaintiff in  
detinue estopped from recovery by an executory agreement to release the property sued for. Executory contract may vest such title in the thing contracted for, as will maintain an action of detinue.



**CLAY**  
**vs.**  
**ROGERS.**

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The doctrine, therefore, that an executory contract for a chattel, confers the right to the thing, ought to prevail at law, as a good defence to an action of detinue brought for the recovery of the thing.

The instructions given by the court, were inconsistent with the foregoing view of the case. We deem it unnecessary to notice them particularly, or any other point made before this court.

The judgment of the circuit court is reversed, with costs, and the cause remanded for a new trial, and for proceedings not inconsistent herewith.

*Wickliffe and Woolley*, for appellant; *Chim* for appellee.

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**MOTION.**

### **Clay vs. Rogers.**

**Case 113.**

*Motion to dismiss appeal.*

Appeal from the Davies Circuit.

**MAY 8.**

Record made out and sworn to be correct, by one not clerk, the clerk having died, no successor appointed when necessary to file the record, admitted to prevent dismissal of appeal.

THE appellee moved the court to dismiss the appeal, because the transcript of the record was not properly certified. It appeared that the decree appealed from, was rendered 13th July, 1831, appeal prayed and appeal bond executed; but before a copy of the record was made out, the clerk died, and before the intervention of a circuit court, it was necessary to lodge the record in the office of this court. The record filed being made out by a person who made affidavit, before a justice of the peace, that the same was correct.

Motion to dismiss overruled.

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**PET. & SUM.**

### **Warner's Executors vs. Spencer.**

**CASE 114.**

Error to the Jessamine Circuit; **KELLEY**, Judge.

*Demurrer. Endorsement. Obliteration. Plea.*

**MAY 9.**

Chief Justice **ROBERTSON** delivered the Opinion of the Court.

If defendant desire to av: il himself of an

THE circuit court sustained a demurrer to a petition and summons on a promissory note for money; and this writ of error is prosecuted to reverse that judgment.

No sufficient reason for sustaining the demurrer, has been perceived. The only reason assigned is, that an obliterated endorsement appeared on the note. That endorsement does not appear to have ever constituted any part of the contract between the parties, or to have been ever made by either of them for that or any other purpose. If it had been a part of their contract, and had been obliterated by the obligee without the assent of the obligor, that fact would be important, but should be pleaded. It cannot be made to appear on demurrer to the petition.

Judgment reversed, and cause remanded, with instructions to overrule the demurrer.

*Hewitt and Chinn, for plaintiffs.*

SINGLETON  
AND TRUE  
vs.  
SODUSKY.

obliterated  
endorsement  
upon a note,  
he must shew  
by plea that  
it affects the  
contract and  
the obliteration  
was without  
his assent.  
Demurrer will  
not avail

## Singleton and True vs. Sodusky.

Error to the Jessamine circuit; W. L. KELLY, Judge.

*Verdict. Certainty.*

ASSAULT &  
BATTERY.  
Case 115.

Chief Justice ROBERTSON delivered the opinion of the Court.

May 9.

In an action of assault and battery, brought by Sodusky against Singleton, True and others, the jury sworn to try the issues concluded by the pleadings, returned the following verdict :

In assault and battery, "We of the jury find against the defendants, A and B, five hundred dollars in damages, and find C and D not guilty" warrants a judgment against A and B.

"We, of the jury, find against the defendants, Singleton and True, five hundred dollars in damages, and find the other defendants not guilty."

Judgment was rendered for the damages (assessed by the jury,) in favor of Sodusky against Singleton and True; and they now insist, that the verdict was vague, and not sufficiently certain to sustain the judgment.

The jury did not, *in form, expressly* respond to the issues of guilty or not guilty; but that they found Singleton and True guilty is necessarily implied, and is as certain as that they found the other defendants not guilty.

Nor does the verdict say, in so many words, that the damages were found *for the plaintiff*, Sodusky. But, surely, there could be no doubt, even by the most sceptical, that the verdict necessarily imports

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that the damages were assessed for *Sodusky* in consequence of the wrong done to him by those found guilty of that wrong.

The judge who would not give judgment on such a verdict would scarcely, if ever, find a jury able to write a verdict in language so explicit, technical or exact as to suit the fastidiousness of his judicial taste, or conquer the scepticism of his learned head.

Judgment affirmed.

*Hewitt*, for plaintiffs; *Haggin*, for defendant.

CHANCERY.

Case 116.

### Stafford vs. Steele's Executors, &c.

Error to the Owen circuit; HICKEY, Judge.

*Bond for land. Assignor and Assignee. Diligence. Responsibility. Administrator with will annexed. Power. Statutes.*

May 9.

Judge UNDERWOOD delivered the opinion of the court.

ON the 28th of October, 1809, John Adams, by William Steele his attorney in fact, executed an obligation for the conveyance of 200 acres of land, part of Richard Adams' survey of 20,000 acres, to Richard Vallandingham, by deed, with general warranty, on or before the 25th December, 1811, in consideration of four hundred dollars. The obligation represents John Adams as acting in the capacity of administrator with the will annexed of Richard Adams. John Adams is represented to be a citizen of Richmond, in the state of Virginia.

On the 30th October, 1812, Vallandingham assigned the obligation to Martin Stafford, who, it seems, transferred 100 of the 200 acres to Nathaniel Walker. There is an endorsement on the obligation, signed by Martin Stafford under date of the 30th November, 1812, in which he acknowledges the conveyance of 100 acres to Walker.

On the 29th March, 1827, Martin Stafford assigned the obligation to Lewis Stafford, the plaintiff in error, without recourse in event the land, or any part thereof, should be lost.

In November, 1827, Lewis Stafford filed his bill **STAFFORD** against the executors of Steele and Vallandingham, **VS.** charging, that Marshall, claiming said 20,000 acres as **STEELE'S EXECUTORS & CO.** a purchase from S. Todd, the administrator with the will annexed of Richard Adams, had recovered the land embraced within the said obligation, from Martin Stafford; that John Adams, as the administrator with the will annexed, never had authority to sell; that his power to Steele, consequently, did not authorize him to sell; that the purchase from Steele was made on the faith of his representations, declaring John Adams was vested with the title, and the power derived from him gave to Steele ample authority to sell and convey; that Martin Stafford purchased from Vallandingham upon the faith of his representations that he held the equitable title; that Steele's power was ample, and that John Adams held the legal title; that the purchase money had been paid to Steele, and that he had never paid over to Adams the same or any part thereof. In consequence of these allegations, and the facts aforesaid, the complainant asserts a right to reclaim the purchase money paid to Steele and likewise to hold Vallandingham answerable for the amount paid to him by Martin Stafford, and which exceeded the sum paid by Vallandingham to Steele.

Steele's executors and Vallandingham demurred separately.

The court sustained each demurrer, and dismissed the bill, with costs.

This decree, in respect to Vallandingham, is correct. The cases of Moredock vs. Rawlings, III Monroe, 75, and Bedal vs. Stith, Ib. 290, conclusively shew that he cannot be charged unless he was guilty of fraud. It is not charged that he acted fraudulently, and thereby induced Martin Stafford to accept the assignment of the obligation. His representations, in faith of which the bill charges the contract was made, could amount to no more, unless tainted by fraud, than the expression of an opinion, that John Adams (who may have been appointed administrator, with the will annexed, by some court in Virginia,) had title, and had authorized Steele to sell and convey. These representations cannot be

The assignor of a bond covenanting to convey land, not responsible to assignee unless due diligence have been used and assignor has failed—Not responsible for the consideration paid by assignee over and above that paid by assignor.

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signor unless  
by special  
contract, tho'  
the vendee of  
assignor had  
no title.

If A, as attor-  
ney for B, who  
has no title,  
sell land to C,  
who is evicted,  
C has a  
right to re-  
cover the  
price paid,  
from A, if he  
have not paid  
over the money;  
if the money be  
paid over, B  
is responsible.  
B (or representatives)  
is a necessary  
defendant.

construed into a guarantee of the title. Therefore, so far as Vallandingham is concerned, the case is no more than the ordinary assignment of an obligation, where the assignee must pursue the obligor with diligence before he can assert a claim against the assignor. The fact that Vallandingham received more money from M. Stafford than he paid Steele, cannot alter the case. It does seem to be a hardship that the assignee should have no redress where he pays double or treble the sum which he can recover from the obligor. But the law is settled, in the cases cited, to the contrary. Assignees must abide by it, and can only guard against its effects by requiring an express contract.

The claim of the complainant against the executors of Steele, stands upon a different footing. If they get hold of the money which their testator received, as agent for Adams, and the land or any part thereof has been taken by a paramount claim, they or Adams should be required to restore it in whole or part. Upon this branch of the case, however, we shall make no comment, as it is our opinion that Adams is a necessary party, and ought to be brought before the court, he being the principal in the obligation. If he be a non-resident, and the funds yet remain in the hands of the representatives of his agent, the case is a clear one for the interposition of the chancellor. The court, upon the demurrer in behalf of Steele's executors, ought to have dismissed the bill without prejudice, for want of proper parties, and it erred in dismissing, as to them, absolutely.

Wherefore, the decree, as to Steele's executors, is reversed, and the cause remanded for proceedings not inconsistent herewith. Vallandingham must recover his costs in this court; the other parties must pay their own costs.

*Marshall*, for plaintiff; *Crittenden*, for Vallandingham.

*In this case, the counsel for plaintiff filed the following petition for a re-hearing, which the court overruled:*

The counsel for the plaintiff in error, would respectfully suggest, that he thinks the position assum-

ed by the court, that this is but a case of an ordinary assignment, in which the assignee must use due diligence, has been assumed without adverting to facts which mark the claim of Stafford with distinguishing traits, and place it in another and distinct class. If obligor in a note, plead usury or the statute against gaming, or *non est factum*, or any other plea impugning the consideration, upon which the note was originally executed, it is not necessary that the assignee should allege or prove due diligence, to charge the assignor. Due diligence is only necessary to responsibility, when by due diligence the sum claimed might have been coerced ; or when the failure has resulted from the insolvency or other disability or inability of the obligor ; not when the consideration, upon which the instrument assigned, has failed, and from that failure the prosecution of the obligor has proved barren and fruitless. Steele's estate is not charged as insolvent. No attempt is made to recover from Vallandingham, the consideration paid to Steele. Stafford has lost the land, not because Steele's estate is insolvent, but because Steele never had power to sell or convey the land.

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ECUTORS &C.  
Petition for a  
re-hearing.

Stafford looks to Steele's representatives as the source whence he is to derive the sum paid by Vallandingham to Steele. But he paid Vallandingham for the land, more than Vallandingham had paid Steele. Is this difference to be lost ? Stafford has lost the land, not from any neglect whereby Steele became less able to convey than he was when the assignment was made, but from the original inability of Steele to make such a contract as the one assigned ; not from Steele's insolvency, but because the original contract carried with it no obligation, and never could have been coerced. Shall he be now answered, that he did not use due diligence, when the most active diligence would only have resulted in waste of time and loss of money ? If Vallandingham was ever liable to pay Stafford the excess over the sum paid by him to Steele, it is difficult to imagine any admitted principle which can have relieved him, unless it have been effected by the lapse of time. Vallandingham is not charged with fraud. He, as well as Stafford, acted under a mistake.

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ECUTORS & C.

Petition for a  
re-hearing.

The reputed intelligence of Col. Steele, and the confidence in his integrity, were deemed by each a perfect guaranty against delusion. Will not the chancellor protect against the consequences of mistake as well as of fraud? The land was the consideration of the original purchase; the land was the consideration moving to the assignee which induced him to pay his assignor, not only the first price, but the additional sum. This consideration has failed. The assignee is not the recipient of the advantage which urged him to the contract. The assignor has not only been reinstated in his original funds, and saved from loss, but he has gained from his assignee the advance paid on his purchase. He has communicated no benefit. How has this occurred? Not through fraud, through mistake. What does honesty require? That the assignor should, as nearly as practicable, restore to his assignee that which has passed from him without any consideration. If Stafford had used due diligence, and Steele had been insolvent, and the land lost, what would have been the sum of Vallandingham's liability? The amount received, together with costs and interest. This is not considered a case in which due diligence is the pivot of responsibility. Under this view, there is no attempt to charge Vallandingham, further than the excess received, over what he paid. The assignor is admitted to be solvent; from his estate the sum received, by him, interest and costs of defending the title, he pretended to sell, are expected to be recovered. What has discharged the assignor from the balance of his responsibility? Lapse of time has not. Time only runs in chancery from the discovery of fraud or mistake, not from the commission. The case of *Moredock vs. Rawlins, III Monroe, 75*, is not one in which the assigned bond was without obligation. The stipulations of the bond had been complied with. A deed had been made. Upon the execution of the deed, the bond was *functus officio*; the relation between assignor and assignee was annihilated. The assignor could not be charged, unless for fraud or misrepresentation. In every case when the bond for a conveyance is obligatory, it is admitted that the undertaking of the assignor is contin-

gent. He is not responsible, unless due diligence has been employed and has failed. What is his responsibility, then? He must refund the sum received, interest and costs. If the bond which he has assigned be invalid, to bind the party whom it purports to bind, and the assignee fails in consequence of that invalidity, upon what pretext can due diligence be required, unless he attempt to charge insolvency? And upon what grounds can the claim of the assignee be diminished? The assignee is still entitled to what he has paid. The responsibility of assignor to assignee is founded upon the failure of consideration. When insolvency is urged as evidence of such failure, due diligence is required to establish the insolvency. It is the only mode of proof admitted by the court. Will you require the same to prove that the bond was executed upon an illegal or turpid or other invalid consideration? To entitle Stafford to recover from Vallandingham, he must shew that he has paid more than he has a right to recover from Steele's estate, and that the bond assigned created no obligation upon Adams. The court cannot require him to institute a suit against Adams or his representatives in order to charge Vallandingham.

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vs  
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ECUTORS & CO.  
Petition for a  
re-hearing.

The exhibition of their title vested in another, and the eviction of Stafford under it must be sufficient. The case of Bedal vs. Stith appears, without examination, to be in point. But that is a case wherein the bond assigned was valid and obligatory. In this case it is not.

The court, in enumerating the undertakings of an assignor, stops short. The assignor of a bond for the conveyance of land may not undertake to warrant the title; but he does undertake that the bond which he assigns is valid, and will enable the assignee to compel the obligor to do that which he stipulates to do, or compensate the failure in damages. The assignor does undertake, that the bond is fair and what it purports to be, and that he who is by its terms, the obligor, is bound by the stipulations of the bond. In fine, the assignor warrants the legal and obligatory force of the instrument he



STAFFORD  
 VP.  
 SKEELE'S EX-  
 ECUTORS &c.  
 Petition for a  
 re-hearing.

assigns. Vallandigham has assigned a bond which had no legal force and binding effect corresponding with its apparent terms and stipulations. Is he less bound than if he had assigned a note founded on a gambling or turpid consideration.

In the case of Bedal vs. Stith, the court say, the consideration had not failed. In this case the consideration has failed. The consideration was the assignment of a bond, which would enable the assignee to obtain from the representatives of R. Adams, a part of his 20,000 acres survey. Was such a bond assigned? It was not. It was false in its representations, and utterly destitute of obligatory force.

If the bond assigned had transferred to the assignee the legal rights which it purported to impart, then it might be said, that the consideration had been imparted to the assignee, and that, by taking the assignment, he had agreed to look to the terms of the bond and the consequences of the covenant of warranty for all remuneration; but when the bond was invalid, inoperative, of no obligatory force, and the assignment did not effect that which the assignee anticipated, and which would have been effected, to his benefit, had the facts existed as the bond represented them to exist, the consideration which induced the reception of the assignment utterly failed. The assignor was immediately responsible to the assignee for the amount paid him. The right to appeal to the chancellor accrued to the assignee *eo instanti* that he discovered the imposition and failure of consideration.

It is respectfully urged, that this case is not in strict unison with Moredock vs. Rawlins or Bedal vs. Stith, and should not be reduced to their standard. In each of these cases, the bond was obligatory; in one, its stipulations had been executed, and a deed accepted. In this case the bond was inoperative in its origin, deceptive in its stipulations, and devoid of all legal influence.

In the opinion of Stafford's counsel, Vallandigham is bound to refund the whole sum paid him, together with interest and costs, yet this is not ask-

ed. He is only required to refund his gains, not to place himself in a losing condition.

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vs.  
BANK COM-  
MONWEALTH.

The court is respectfully requested to reconsider this branch of the cause, and if the allegation of non-residence, on the part of the representatives of Americans, be not sufficient to prevent the necessity of making them parties, it is requested that the court below be directed to allow the complainant time to bring them before the court.

J. J. MARSHALL,  
*for plaintiff in error.*

**Briscoe &c. vs. Bank of the Commonwealth.** DEBT.

Appeal from the Mercer Circuit; KELLY Judge.

Case 117.

*Bank of the Commonwealth. Constitution of the United States.*

Judge NICHOLAS delivered the opinion of the court.

May 9.

WE are called upon in this case, to re-adjudicate the question of the constitutionality of the Bank of the Commonwealth, and its right to maintain an action upon an obligation given in consideration of a loan of its notes. We consider this question as having been settled in the case of Lampton against the Bank, II. Litt. 300. If it be true as contended in argument, on behalf of the appellants, that the question is presented on the face of the charter, that case has been incidentally recognised and confirmed by a hundred cases, that have since passed through this court. The case of Craig vs. Missouri, IV. Peters, has been relied on as ruling this. We do not think that it does. They are distinguishable in at least one important and essential particular.

The Bank of the Commonwealth recognized to be consistent with the constitution of the U. S. in conformity with previous decisions.

Wherefore, judgment is affirmed with damages and costs.

*Owsley and Haggin*, for appellants; *Crittenden*, for appellee.

DEBT.

**Wilson's Heirs vs. Ryan.**

Case 113.

Appeal from the Ma-on Circuit; ROPER, Judge.

*Right of holder of a note to strike out intermediate endorsements and sue in the name of payee.*

May 9.

Judge NICHOLAS delivered the opinion of the court.

Bank to whom a note has been regularly passed by endorsement though the same have been discounted and thereby placed on the footing of a bill of exchange, cannot strike out the intermediate endorsements and sue in the name of payee. The plaintiff must have the legal title to the note to maintain the action.

THIS is an action brought in the name of James Ryan, for the use of the Limestone Bank, against the heirs of John A. Wilson, upon a note executed by him to James Ryan, who endorsed it in blank to Moses Ryan, who endorsed it in blank to the Bank of Limestone, who discounted it for the benefit of Wilson. There was no re-assignment of the note to James Ryan, the plaintiff, or payment of it by him, but the note was sued on in his name for the benefit of the Bank, under a supposition that the charter of the Bank had expired, and it no longer had authority to sue in its own name.

Upon an agreed case presenting these facts, the court rendered judgment in favor of the plaintiff.

It is now insisted that the judgment was right, because the discounting of the note having placed the note on the footing of a bill of exchange, the bank, as the holder, had a right to strike out the intermediate endorsement and sue for its own benefit, in the name of the payee. We think otherwise. The plaintiff, whether nominal or real, must always be vested with the legal right of action. The property in the note had passed by the endorsements to the bank, and could not revert to Ryan so as to clothe him with the right of action on it, unless he had paid it or obtained a re-assignment. If he had paid the note, he no doubt would, as the holder and proprietor, have had a right to strike out any endorsement subsequent to his own, and bring suit in his own name. But the bank, whilst still holding and owning the note, could not, by striking out the intermediate endorsement, reinvest him with the legal title to the note so as to enable it to sue in his name, even for the bank's benefit. The only effect of such an operation would be to break one link of the chain of title, by which the note was transferred to the bank, and render James Ryan the immediate instead of the remote assignor

to the bank. It reconveyed no property in the note to him. See Hardin, 562.

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We have not thought it necessary to investigate the question whether the bank still retains the power of suing, for let that be as it may, it would not affect the right of suing in the name of Ryan.

Wherefore, the judgment is reversed and cause remanded, with directions to enter judgment upon the facts agreed in favor of the appellants, who must recover costs here.

*Reid*, for appellants; *Brown and Morehead*, for appellee.

## Ready's Heirs vs. Stephenson.

COVENANT.

Error to the Hardin Circuit; BOOKER, Judge.

Case 119.

*Responsibility of heir. Common law. Statute. Estate descended. Verdict. Judgment.*

Chief Justice ROBERTSON, delivered the opinion of the Court.

May 10.

THIS is an action of covenant brought by the defendant against the plaintiffs in error, as heirs, on the covenant of their ancestor, expressly binding them.

The declaration averred that estate sufficient to pay the damages sued for, had descended to the plaintiffs in error, from their ancestor. They pleaded that *nothing had ever descended to them*, and having concluded to the country, an issue was joined by a *similiter*. The jury found that estate of the value of \$649 had descended, and assessed the damages at that sum, for which judgment was rendered to be levied of the estate of the plaintiffs. They prosecute this writ of error to reverse that judgment.

At common law, an heir, though expressly bound by the covenant of his ancestor, was responsible only for the value of the estate which had descended; and even though estate had descended to him, he was not liable at all, if he had alienated it prior to the impetration of the writ sued out against him, on his ancestor's covenant. Hence, if he had alienated the estate before the commencement of the suit

At common law, heirs only responsible on covenant of ancestor, when expressly bound. Then only to the extent of assets descended.

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against him, he might have exonerated himself altogether, by pleading that he had no estate by descent, *at the date of the writ.*

descended and  
not alienated  
prior to suit.

Statute 1796,  
I. Dig. 627,  
altered the  
common law,  
relative to  
the liability  
of heirs; but  
did not alter  
the mode of  
pleading.

A statute of W. and M. similar to that of this state, enacted in 1796, I Dig. 627, modified the common law doctrine and subjected heirs to liability, on such covenants of their ancestors as bound them, for the value of the estate descended, and which had been alienated prior to suit brought. But the mode of pleading was not changed; and, therefore, an heir might, after the enactment of those statutes, as before, plead, *riens per descent, at the date of the writ.* But the plaintiff might reply that estate *had descended* to the heir. As an issue made up on such a replication to such a plea, virtually implied, that if estate had ever descended, it had been alienated, the jury was required, on such an issue, to ascertain the value of the estate which had descended, and judgment was rendered on such a verdict, personally against the heir, according to the value assessed.

According to the common law also, executors, administrators, and heirs were responsible, personally, for a default or false plea, either of which was supposed to admit assets or estate. To exonerate himself from the penalty of a default or false plea, an heir, to whom some estate had descended, might confess the action and set forth the estate which had descended to him, and then, unless it was shown by the plaintiff, that other estate had also descended, the judgment was rendered only against the estate so disclosed.

Act of 1811  
I. Dig. 535,  
applies to  
heirs as well  
as adminis-  
trators & ex-  
ecutors and  
relieves from  
the common  
law conse-  
quences of  
false pleading  
and judgment  
by default.

An act of 1811, I Dig. 535, which, among other things, declares that executors or administrators shall not be made liable, in consequence of any default or false plea, beyond the amount of assets, declares also, that its provisions, as far as they may be applicable, shall apply to heirs.

In *Carneal's heirs vs. Day*, II Littell, 397, this court decided that the act of 1811 applied to decrees against heirs, who were sued with the personal representatives under the statute authorizing such a joint suit.

In *Philips vs. Munsell*, (M. S. S.) this court decided also that the act applied to judgments by default against heirs on covenants, by their ancestors, expressly binding them. READY'S  
HEIRS  
- vs.  
STEPHENSON.

In both cases it was decided, of course, that the judgment should be rendered to be levied of the estate descended.

We cannot perceive why, if the act of 1811 be applicable, in any case, to heirs, it should not apply to them, as to executors, in all cases in which, for false plea or default, they were liable, prior to 1811, *de bonis propriis*. If the letter or reason of the first section apply to them in any case, they both equally apply to them in all cases of default and of false pleading, excepting only a case in which it should be found expressly or constructively by verdict, on a proper issue for that purpose, that assets had descended, *and had been alienated*; in which last case a judgment to be levied of the estate descended, would be nugatory, and therefore improper.

When a judgment by default is rendered against an heir, he is not, since the act of 1811, liable beyond the estate which had descended to him, and the judgment should go against that estate only. Why should any other judgment be rendered in this case? not because the plea was false, for an executor or administrator is not now liable to any other kind of judgment, merely in consequence of a false plea, and the act of 1811 applies, in that particular, to heirs also. The 1st section of that act is the only part of it which has been construed to apply to heirs; and we can perceive no reason for qualifying its application, nor would we be able to define its application to heirs, unless it shall apply to them precisely as it would to personal representatives, under similar circumstances. The Legislative department saw fit to declare that, as to the consequences of a default or mispleading, or false pleading, heirs and personal representatives should stand on the same ground. Our province is to give full and practical effect to the plain and express will of the legislature, constitutionally declared; and it seems to us that we would be assuming legislative

Since the act of 1811, heir is not responsible beyond the estate descended, tho' judgment by default or false plea & judgment should be to subject that estate only.

READY'S  
HEIRS  
vs.  
STEPHENSON.

Act of 1811,  
l. Dig. 535  
construed &  
applied.

power instead of exercising the judicial function, were we to declare that the 1st section of the act of 1811, shall not be applied to heirs, co-extensively with its application to executors and administrators.

We think that when applied to heirs, it should be read by omitting "executors and administrators" and inserting in lieu thereof, "heirs," and that consequently, whenever, according to that section, it would be proper to render a judgment against a personal representative, to be levied of the assets, it would be equally proper, under the like circumstances, in the case of an heir, to render the judgment to be levied of the estate descended.

Same judgment should be rendered upon verdict vs. heirs upon plea of *riens per descent*, which would be rendered vs. executor or administrator upon plea of *plene administravit* found vs. them. Joint judgment vs. several heirs, all insolvent but one, he would not be liable for the whole amount.

When a plea of *plene administravit* is found untrue, and the amount of assets is assessed, judgment should, nevertheless, be rendered, *de bonis testatoris*; and this was even the common law doctrine: II Sanders's Reports, 336, a. n. 10. Why should not the same rule now apply to an ordinary issue on *riens per descent*? a verdict against an heir, upon such an issue, does not imply that the estate had been alienated; and he ought to be permitted to exonerate himself by surrendering it in execution, because it might not sell for as much as its assessed value, and if it should not, he ought not to be subjected to personal loss. The estate descended, and nothing more, should be required of him. The value of that estate was not, prior to 1811, involved in such an issue as that tried by the jury in this case: Jefferson vs. Morton et al. II Sanders's Reports 7, n. 4. And, therefore, the verdict was inconclusive as to the value of the estate; and the only consequence of its assessment was, (as it would have been in the case of an executor on a plea of *no assets*,) that the judgment could not have exceeded the amount of it. The judgment is joint. Suppose that all the heirs except one were insolvent, ought that one to be personally responsible for the whole judgment? We think not.

If estate have been alienated creditor may subject heir personal- It may be objected that the heirs may have alienated the estate. The same objection would apply equally to a judgment by default; and it is now too late to doubt that a judgment by default should, in

the first instance, be rendered only against the estate descended. If, in any case, the estate shall have been alienated, the creditor might have an effectual remedy by an appropriate proceeding on the judgment; in which, by proving, in a proper manner, the alienation, he might, as in the case of a devastavit, subject the heirs to personal responsibility for the value of the estate so alienated. If this would be circuitous and inconvenient in one class of cases, it would be equally so in any other class. And it would be as eligible and as effectual in such a case as this, as it would be if the judgment had been by default.

In a joint suit against the personal and real representatives (the latter not being expressly bound,) the judgment should be rendered against them all in the same way. The statute of 1811 has not discriminated between an heir expressly liable on his ancestor's covenant, and one who may be charged only in a joint suit with the personal representative. And it seems to us that every reason or principle of justice which can be applied to the one, is equally applicable to the other. A verdict against the one by default, or otherwise, cannot import more, and therefore, should not operate in any other manner than a similar finding against the other.

The object of the act of 1811, was to relieve personal representatives and heirs from the rigor of the common law, in cases of default and false pleading; and, in that respect, to change the common law doctrine and practice. And we believe that a reasonable and consistent interpretation of the statute, will render all the provisions of the 1st section applicable, in substance, to heirs, whenever, in the like case, they would apply to executors or administrators.

Wherefore, we are of the opinion that, as the verdict in this case did not ascertain, (on a proper issue for that purpose,) that the estate assessed had been alienated, the judgment *de bonis propriis* was erroneous.

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ly by proceedings on judgment vs. estate descended and proving alienation.

In joint action vs. personal representative and heir not expressly bound, judgment to be rendered vs. all in the same way.

The object of the act of 1811 was to relieve executors and heirs from the rigor of the common law. The 1st section applicable to heirs, whenever in like case it would apply to executors or administrators.

If upon proper issue verdict do not find the estate assessed to have been alienated, judgment must go vs. estate descended, not *de bonis propriis*.



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And therefore, the judgment is reversed, and the cause remanded, with instructions to render judgment, to be levied of the estate descended.

*Talbot and Lyle, for plaintiffs.*

Judge UNDERWOOD delivered the following opinion, dissenting from the decision of the court.

Dissent.

AT common law, the heir is liable for all the obligations of his ancestor, in which he is expressly bound. The liability is not absolute. It is conditional, subject to be limited by the value of the real assets descended. But notwithstanding this restriction, the debt which devolves upon the heir is technically in the eye of the law, his own proper debt, and he is to be sued for it as such. He is to be sued for it in the debt and detinet as for his own debt. He is not charged as tenant of the land descended. As, however, it would be unjust to compel the heir to pay a debt when his ancestor had left him nothing to pay with, or to make him pay the whole debt, when the estate descended is worth only part of the amount, the law wisely provided that he might avoid liability beyond what strict justice required, by pleading either *riens per descent*, which if true, exonerated him altogether, or "to confess the action and show the certainty of assets," by plea, whereby the assets descended were specifically subjected, and the heir relieved from further liability. Under these rules an honest heir had a plain road pointed out, by which he might escape from every thing like injustice. If the heir did not take this road, but pursued, under the suggestions of fraud and avarice, a devious by path, the law punishes his iniquity by subjecting him personally to the payment of the whole debt, no matter whether the estate descended was of value sufficient to pay it or not. Thus, if the heir was sued for \$1000 on the obligation of his ancestor, and he falsely plead nothing by descent, and it turned out that estate of the value of \$100 only had descended, he was subjected personally to the payment of the whole \$1000. If the heir be sued for the debt of his ancestor, and he permits "judgment to be given by default, or *nil dicit*, or confession, or on any other matter or ground whatsoever,

without confessing and showing the certainty of assets, the plaintiff shall have execution of his other land or of his goods or of his body, as he should have for the debt of the heir himself on his own bond." Davy vs. Pepys, Plowden, 440. See also the various authorities in support of the text referred to in note 4, II Sanders, 7; and where all of the foregoing positions will be found to be fully supported by authority.

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The plea of *riens per descent* related to the time of instituting the suit against the heir. If at that time, he had nothing which had descended to him from his ancestor, his plea was true, although he may have inherited a large estate, provided in good faith he alienated it, before suit brought. The consequence was, that the heir was exonerated at law, whatever liability might still rest upon him in chancery. This doctrine put it in the power of heirs to delay and trifle with creditors by alienating the lands descended. In England this evil was remedied by the statute of III and IV W. and M. c. 5, s. 5, from which the 4th and 5th sections of our act of 1796, I Dig. 627, have been almost literally taken. If the heir had alienated the estate before suit brought and plead *riens per descent*, and the plaintiff replied according to the provisions of these statutes in order to avoid the effect of the alienation before suit brought, and the issue was found for the plaintiff, then he could only recover the value of the land sold by the heir, and not his whole debt, if the value did not come up to it. In proceeding under these statutes it was necessary that the jury should assess the value of the land alienated, and for the value so assessed, judgment was properly rendered against the heir *in personam*. Thus stood the law until 1811, and it is worthy of remark that in every instance judgment was properly rendered *in personam* against the heir, unless he confessed the action and showed the assets descended with certainty in his plea. In that event judgment went against the assets. Now in this case it is clear that the heirs have plead a false plea, they have not pretended to show the certainty of assets, and therefore upon the principles of the common law judgment should be personally render-

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ed against them for the whole amount of the debt of their ancestor.

The question then is, how far has the act of 1811, 1 Dig. 534, changed the law, which would, but for that act, govern the case? The 4th section of the act provides that "the heir or heirs of a deceased person shall be entitled to receive the benefit of all and every of the provisions aforesaid, relating to executors and administrators, as far as the same are applicable." It becomes necessary, therefore, to enquire into the law relative to executors and administrators, in order to ascertain the true application of the statute of 1811, to the case of heirs.

The obligation of a testator does not devolve upon the executor, so as to make it the executor's debt. The executor being a mere fiduciary, he is properly suable in the *debitum* only. The law is otherwise in regard to heirs. When an executor or administrator fails to plead, or pleads any plea except such as are knowingly false, the judgment should be rendered *de bonis testatoris*, because the presumption is in favor of his honesty, and therefore it should be expected that he will (after the justice of the demand has been settled by judgment) surrender the goods in satisfaction. The judgment, when taken by default or upon various pleas, such as *non est factum testatoris*, payment by him &c. amounts to a confession of assets sufficient to pay the debt; but notwithstanding this, it seems to me that there would be an impropriety in rendering the judgment against the executor *de bonis propriis* in the first instance; because in that event, the officer who executed the judgment might not discriminate between the goods of the testator and the proper goods of the executor; and might, if so disposed, seize and sell the latter, which would be great injustice. Whatever may be the reason, it is certain that the law in these cases required the judgment to be entered *de bonis testatoris*: 1 Sanders, 336, note 10. But where the executor knowingly pleaded a false plea, such as *ne unques executor*; or a release to himself, and it is proved against him, then the proper manner of entering judgment according to the authorities, is, in the first place *de bonis testatoris si &c. et sinon &c. de*

*bonis propriis.* Upon this judgment execution could issue and be satisfied out of the proper goods of the executor, if no goods of the testator could be found. If it be asked why may not judgment be rendered in the same manner upon default, or when the executor puts in a plea not knowing it to be false, since a judgment *de bonis testatoris si &c. et sinon &c. de bonis propriis*, would supersede the necessity for a *scire fieri* enquiry, or an action suggesting a *devastavit*? I answer, that law does not anticipate fraud. It expects of a mere fiduciary, honest conduct, but where he has been convicted of a false plea, knowing it to be such, there is then ground to suspect him of fraud, and hence in such a case, the propriety of entering the judgment in the alternative, as above.

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But the nicety of pleading required in many cases by executors and administrators, especially when conducted by inexperienced counsel, frequently involved executors and administrators into the admission of assets when they were honestly endeavoring to perform their duty according to law, and when there was a deficiency of assets. To obviate evils growing out of such strictness, the act of 1811 provides in substance, that executors shall not be liable for more than the amount of assets which have or shall come to their hands on account of failing to make defence or on account of any plea pleaded. This statute did not change, nor purport to change the mode of proceeding against executors and administrators, nor to alter the manner of rendering judgments against them. The statute cannot, in general, have any effect upon the manner of entering a judgment against an executor or administrator; and it has been the uniform practice since its passage, so far as my knowledge extends, to enter judgment by default, and upon pleas false in fact, but not necessarily known to the executor or administrator to be such, precisely as they were entered before the passage of the statute. But after judgments are so rendered, and when the plaintiff proceeds either by action suggesting a *devastavit*, or by a *scire fieri* enquiry to charge the executor or administrator personally, then the statute comes in to his aid for the purpose of avoiding the conclusion

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which resulted by the rules of the common law from the recovery of the judgment in the first instance, that the executor or administrator had assets sufficient to pay the debt; and by operation of the statute the executor or administrator is allowed to reduce his personal liability to the amount of the assets. In case the executor or administrator knowingly pleaded a false plea, in consequence of which, upon the principles already stated, judgment would be rendered, to be levied first of the goods of the testator or intestate, and if none could be found, then of the proper goods of the executor or administrator, there might be some difficulty since the passage of the statute, in entering a judgment, unless the amount of the assets were ascertained by the verdict; in which event the judgment, so far as it operated personally on the fiduciary, might be limited to the amount of the assets so found. But in all other cases except this, the judgment must be rendered against an executor or administrator, notwithstanding the statute, precisely as it would have been before the act passed, and the benefits resulting to executors and administrators from the act, could only be felt when they were thereafter proceeded against personally for a *devastavit*.

Now, it is perfectly clear to my mind, from the foregoing view of the subject, that executors and administrators were never charged personally, in the first instance, unless they were convicted of having pleaded a false plea, knowing it to be such, and that the heir was uniformly charged, personally, whenever he permitted judgment to be entered by default against him, and more especially if he pleaded a false plea. Now, the opinion delivered in this case, makes the 4th section of the act of 1811, which does no more than confer on heirs the benefits of the previous sections, '*as far as they are applicable,*' change entirely the nature of the judgment against the heir, and requires it to be entered against him, for the assets descended, when there is not a word in the act, that directs such a change, and when it is manifest, that the whole object of the act was merely to limit the recovery against executors, administrators, and heirs, to the value of the assets. Thus, the opinion

delivered, regards the act of 1811, as repealing the doctrines of the common law, under which the heir was always charged with the debt of his ancestor in the same manner as for his own debt, where he was expressly named in the obligation, and placing the heir in the attitude of a mere fiduciary. I cannot consent to that construction of the statute which produces such a radical change in the law, unless the legislature had used stronger language, than merely to declare that the rules prescribed in relation to executors and administrators, should apply to heirs "*as far as they are applicable.*" The consequence of this construction of the statute is, that executors, administrators and heirs, are placed precisely upon the same footing, in relation to the nature of the remedy against them. The very language used in the 4th section, shews in my opinion, that the legislature never intended to produce such an entire revolution in the remedy previously existing against an heir. On the contrary, as I understand the statute, the legislature designed no more than to provide, when executors and administrators are proceeded against, with a view to render them personally liable, no recovery shall be had beyond the amount of assets; and this principle is applied to the case of heirs, by the 4th section, without intending to change the nature of the judgment. Why change it, when as in this case, the jury has found the value of the assets in the hands of the heir? Ought he not to be liable for that value? Suppose the change is made and judgment is rendered against the heir, to be levied of the estate descended, and before execution, the heir alienates the estate, what then shall the plaintiff do to obtain satisfaction? If the principles of the opinion are carried out, the plaintiff must sue the heir for a *devastavit*, and then the value of the estate descended, must be found by the jury, and for the value so found, the court will render judgment personally against the heir. Why not let the jury find the value of the estate descended in the first suit, as has been done in this case, under an appropriate averment in the declaration, and save the expense and trouble of a second action? The presumption of law is, that the jury will do the heir

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justice in their finding, and that he will not be personally charged with a larger sum than he ought to pay. Why confide in a jury to assess the value when the heir is sued for a *devastavit* in preference to confiding in them in the first trial? There is as much danger of their doing wrong in the one case as the other. If there be any evil to be apprehended, the heir may avoid it by confessing the action and showing the certainty of assets, and if he does not do this I can perceive no reason under the statute, why the value of the estate descended, may not be ascertained on the first trial, and judgment rendered accordingly *in personam*. It is my opinion, that such course is sanctioned both by the policy and spirit of the statute, and that there is nothing to be found in the latter, which forbids it, and hence, I would affirm the judgment.

This court, heretofore, has had difficulty in applying the act of 1811, to heirs in any case. To give it the application which I have pointed out, will, it seems to me, meet the intention of the legislature, and render the statute conducive to the ends of justice. To go farther, and make it operate so as to require two suits instead of one, in order to get at the estate descended, or its value, tends to procrastinate and defeat justice. Such a construction ought not to be allowed, unless it had been imperiously required by the language of the act. It will be necessary, in all cases since the act of 1811, that the jury should as in this case, find the value of the estate descended, so that the judgment may be rendered personally, against the heirs.

That the act of 1811, ought not to be construed, "so as to affect the mode of entering the judgment," was expressly decided by the court, in the case of Keizer's heirs vs. Adams, 1 Marshall, 315, and I have met with no subsequent case, which overrules that decision, when applied to the facts of this case. *Carnal's heirs vs. Day &c.* 11 Litt. 397, is a case where the heirs were not bound at common law, and where the bill did not allege that the heirs had assets by descent, and consequently, there was no finding of assets, to any value. I therefore look upon the doc-

trines for which I contend, as having been heretofore sanctioned by this court. If a plaintiff takes judgment against an heir, to be levied of the estate descended, when he might take it *in personam*, by proving the value of the estate, it could not be error to the prejudice of the heir.

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I will put one case and dismiss the subject. Since the act of 1819, (Digest 1537,) executors and administrators cannot be sued after distribution and the settlement of their accounts, in certain cases. The creditor must look to the distributee. Now suppose the executor passes to the heir, a female slave, worth \$300, that she lives 10 years, having five children, in the mean time, and then dies. The heir, cannot, I think be made answerable to the creditor for the value of the increase, but I think he cannot escape paying the value of the mother. In this case can any reason be assigned why he should not be made to pay the value of the slave descended in the first suit. A judgment to be levied of the estate descended, can never be productive, because the slave was dead, before it was rendered. Here then the first suit is altogether useless, except as it may lay the foundation for the second. I cannot consent to double expense and procrastination, when there is no reason for it, except the possibility that the jury under my rule, may value the estate higher than the price it would bring, under the sheriff's hammer, and when at last, it must come to the rule for which I contend.

## Taylor's and Kelly's heirs vs. Watkins CHANCERY. et al.

Error to the Lewis Circuit; ROPER Judge.

Case 120.

*Entry. Notoriety. Survey. Amalgamation of suits.  
Rule in chancery. Parties.*

Judge UNDERWOOD delivered the opinion of the court.

May 11.

THE principal questions presented by the record, relate to the validity of the following entry, and the proper mode of surveying it. "November 27th, 1783, George Taylor, assignee, &c. and



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Joseph Kelly, assignee, &c. enter 5,791½ acres of land, on two treasury warrants, No. 9,406, and 18,538, to be held in proportion to the number of acres in each man's name, lying on Cabin Creek, beginning two miles above the first fork of said creek, on the dividing ridge between the two forks, running thence up the right hand fork of said creek, 1400 poles, thence at right angles from each end of this line, towards the left hand fork, for quantity."

Congenial, with chancery practice, to amalgamate suits, when the cause of action is joint and the parties interested, are thus brought before the court.

In virtue of the foregoing entry, a patent issued in the names of Taylor & Kelly, jointly. Their heirs brought separate bills, in order to set up the entry against elder grants. These suits were afterwards amalgamated, and proceeded as a suit in behalf of the heirs of both patentees. We do not perceive in this proceeding, the violation of any principle settled in the case of Robert's heirs vs. Elliott's heirs &c 3 Mon. 398. Here all the parties interested in the patent, were before the court, as complainants, and a decision for or against, would have bound all, and therefore, they come within the reason of the rule, which requires all interested, to be before the court, in order to prevent cutting up a single cause of action, into many suits.

Case of entry, to run up a creek certain distance the general course of the creek for the base; a straight line from the beginning, to a point on the creek, the distance called not a line parallel to the creek, is the base.

Cabin Creek was notorious at the date of the entry. The first fork was an object which could not have been mistaken, and from that place, the ridge could easily have been traced, the distance of two miles to the point where the entry located the beginning. This point, we think could have been ascertained with certainty, upon reasonable diligence, and the use of ordinary means. Having reached it, the subsequent locator would next regard the location of Taylor's & Kelly's base line. How should that be done? We answer, by running from the beginning, to a point on the right hand fork of Cabin Creek, 1400 poles distant. A straight line from the beginning, to such point, would constitute the base, which being ascertained, there could be no difficulty in constructing the survey. The circuit court, instead of locating the base as above, directed that it should run from the beginning, parallel to the general course of the right hand fork, or rather parallel to the general course of a part of the right hand fork. We do not

perceive any thing in the entry, which indicates the propriety of running such a parallel line for the base, nor do we know any principle or adjudged case which will aid in pointing out that part of the right hand fork, the general course of which should govern in running the parallel line. Should the general course of the whole creek, from its mouth in the Ohio, to its source, be ascertained, or from the forks upwards, or from the point assumed by the court, on the right hand fork, about two miles above the forks? Neither the entry, nor any rule known to us will enable us to give a satisfactory answer. Entries should be understood, as those upon the ground, when they were made, would have understood them. According to this rule, it seems to us, that a person in 1783, or at any time since, acquainted with the import of the language of the entry, placed at the beginning, would have said, the locator meant to go "thence up the right hand fork of the creek," and not to depart from it by running a parallel line thereto, or to any part of it, and that the locator did not intend to make the windings of the creek, the boundary of his survey, hence he called for the *general course*, indicating thereby his intention to be governed by a straight line, instead of the meanders. This construction will make the general course of the creek, a boundary, from the point where the line from the beginning strikes it, to the termination of the 1400 poles, upon the creek, and thus respect will be paid to the call, to *run up the creek its general course*. If the beginning had been upon the creek, there could be no doubt of the propriety of this construction. We are of opinion that the location of the beginning, on the ridge between the two creeks, does not change it, but that the locator intended to have his upper corner on the termination of his 1400 poles from the beginning, located on the creek, in the same manner as would have been obviously proper, had the creek run by the beginning.

The court erred in its construction of the entry, and therefore, the decree must be reversed, and the cause remanded for a decree in conformity to this opinion. If in extending a line 1400 poles, up the right hand fork, from the place of beginning, on the

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construction  
most unfa-  
vorable to claim-  
ants must be  
adopted.

Costs given  
against those  
only who were  
already bene-  
fitted by the  
decree revers-  
ed. No costs  
for or against  
those whose  
condition was  
doubtful.

ridge, it should pass the fork at 45 on Hord's plot, then, as there are doubts which is the main fork, above that point, the court must fix the termination of the 1400 poles, on that fork most unfavorable to the complainants. In other words, the entry should only be sustained for the land common to surveys made upon base lines, terminating on both the forks above 45 on Hord's plot, and covered by the patent of complainants. We do not mean to decide upon the effect of the statute of limitations, relied on by the defendants, or some of them, in argument before this court. They have not disturbed the decree, or offered to do it. Upon this point, the circuit court is left untrammelled upon the return of the cause.

The decree must be reversed, but as it is probable that the error of the court did not prejudice the complainants, in respect to many of the defendants, because, by surveying according to the entry, they will not be included, we think it would be improper to make such defendants answerable for costs in this court. The circuit court ought to have caused the entry to be surveyed, as directed in this opinion, before entering a final decree, and then the defendants should have been compelled to relinquish such portions of the land as they held, found to be common to the survey as carried into Grant, and the survey as directed. We cannot tell how the defendants may be affected by the survey of the entry as herein directed, and on that account we have deemed it proper to reverse as it respects all the defendants; but, owing to the uncertainty which exists, whether a large portion of the defendants, will be affected by the survey, as it should have been made, a majority of the court, are of opinion, that such defendants should neither recover, or be compelled to pay costs in this court. But that the complainants should have a decree for costs in this court only, against James Fyffe, William Watkins, Jonathan M. Grover; the heirs of James Savage; the heirs of Robert Taylor, John Watkins, William Crawford, Joseph Fitch, James Burkly, James Rowland, Isaac Smith, and one Hendrickson; these being the only persons who resisted the complainant's right, and who appear to us to have been clearly benefitted by the error com-

mitted by the court, in the manner of surveying the entry.

Since the hearing of this cause, the suit in this court has been abated, as to the heirs of Kelly. Upon the return of the cause, the circuit court must act upon this opinion, in favor of Taylor's heirs only.

*Crittenden, Wickliffe, and Woolley, for plaintiffs; Mills and Brown, for defendants.*

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Joint complainants,  
one dies after  
hearing and  
writ abated,  
the decree  
only to be  
acted on in  
court below  
as to revivor.

## Grundy vs. Edwards.

Error to the Union Circuit; SHACKLEFORD, Judge.

COVENANT.

Case 121.

*Covenant. Measure of Damages. Parol Proof.*

Judge NICHOLAS delivered the opinion of the Court.

May 11.

THIS writ of error is prosecuted to reverse a judgment obtained by Grundy against Edwards in an action on a covenant for the conveyance of the moiety of a tan yard. Judgment went, by default, against Edwards.

On the enquiry as to the damages, after Grundy had read in evidence the covenant, reciting a consideration of six hundred dollars, the court permitted Edwards to prove that the property was at the time of sale of less value than six hundred dollars, and that, according to the agreement and understanding of the parties, the consideration was payable in notes of the Commonwealth's bank, then at a great depreciation. The court also refused, at the instance of the plaintiff, to instruct the jury that the covenant was conclusive evidence between the parties of what was agreed to be paid, and the jury thereupon found a verdict for Grundy for only \$372.

The measure of damages for a breach of a covenant to convey, is the sum paid or agreed to be paid by the covenantee, and not the actual value of the property at the date of the sale. The sum recited in the covenant, as having been paid or agreed to be paid, must, in the absence of other written evidence, be ever taken and held in a court of com-

The sum paid or agreed to be paid, is the measure of damages for breach of covenant in consideration thereof.

GRUNDY

EDWARDS.

Paro test i  
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mon law to be the true sum. It was evidently im-  
proper in the court to prevent parol testimony to be  
used either to shew that the term dollars meant bank  
paper, or that the covenant did not correctly recite  
the agreement between the parties as to the consid-  
eration.

Wherefore, judgment reversed, and cause remand-  
ed, for further proceedings consistent herewith.  
Plaintiff in error must recover costs.

*Brown*, for plaintiff; *Crittenden*, for defendant.

CHANCERY.

## Grundy vs. Edwards.

Case 122.

Error to the Union Circuit; SHACKLEFORD, Judge.

*Specific performance. Chancery practice. Judgment.*  
*Reversal. Waiver. Demurrer.*

May 11.

Judge NICHOLAS delivered the opinion of the court.

AFTER the obtention of the judgment  
by Grundy against Edwards, mentioned in the opin-  
ion just delivered, the latter filed his bill, with in-  
junction against said judgment, praying a specific  
enforcement of the contract, and that Grundy might  
be compelled to take a conveyance of the moiety of  
the tan yard in satisfaction of his judgment. On  
final hearing, the court decreed, pursuant to the  
prayer of the bill, and to reverse the decree, Grundy  
prosecutes this appeal.

Grundy made his answer a cross bill, and among  
other grounds relied on for resisting a specific per-  
formance of the contract, states, that as an induce-  
ment to him to make the purchase of Edwards, the  
latter agreed that he would not erect or carry on a  
tan yard in the town of Morganfield or county of  
Union. That, in violation of this agreement, he had  
shortly after the sale erected, and ever since carried  
on, a tan yard in Morganfield, in the immediate vi-  
cinity of the one sold to Grundy, and to the great  
prejudice and injury of the latter. To this matter  
thus set up in the cross bill, Edwards demurred, and  
the court sustained the demurrer, adjudging such  
matter impertinent and irrelevant.

7jm 368  
3 180

7jm 368  
8 815

We have taken a very different view of it. No **GRUNDY** principle is better settled than that a man may law- **vs.** fully contract not to carry on his trade or business **EDWARDS** in any particular town or county, and for a breach **Covenant not to carry on a trade in a particular town or county, valid.—** of such contract, he will be compelled to make adequate compensation. Applications to the chancellor for the specific enforcement of contracts are always addressed to his discretion, and he will rarely, if ever, in the exercise of that discretion, extend relief, in such cases, to any one who has wilfully violated an essential part of the agreement which constituted an inducement to the purchase. We think the probable prejudice, likely to ensue to Grundy, from a breach of this part of the agreement, a controlling circumstance of sufficient importance to induce the withholding from Edwards the relief he seeks. But as it would be manifestly unjust towards him, to act upon the record in its present attitude, the cause must be sent back, and an opportunity afforded him to answer the cross bill. Should he answer and deny the 'alleged agreement, it must be made out by satisfactory proof according to chancery rule. **Damages given at law for breach, and specific performance denied in chancery to one who has violated it.**

Grundy having reversed his judgment, and thereby waived the advantage he held in that particular at filing of the bill, it has become unnecessary for us to determine, whether the circumstance of his having obtained a judgment and rescission of the contract at law, would have precluded Edwards from obtaining a specific performance. That obstacle out of the way, there is no proper ground left for denying it, unless the matter set up in the cross bill should turn out as alleged. **Cause remanded to enable complainant to withdraw demurrer and answer.** **Reversal of judgment at law vs. complainant who seeks specific enforcement of the contract sued on, removes that barrier to granting relief.**

Decree reversed, and cause remanded, with directions for further proceedings consistent herewith. Appellant must recover his costs.

*Brown*, for appellant ; *Crittenden*, for appellee.

VOL. VII.

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**DEBT. Morrow's Administrator vs. Mason et al.****Case 128.** Error to the Montgomery Circuit; ROBBIN, Judge.*Appeal bond. Replevin bond. Satisfaction. Security.***May 12.** Chief Justice ROBERTSON delivered the Opinion of the Court.

ON the 7th of October, 1823, John Mason, as principal, and James Mason, as his surety, entered into an appeal bond for prosecuting an appeal to this court from a judgment which had been rendered in favor of Thomas Morrow against the said John Mason.

The condition of the bond was that, in the event of an affirmance by this court, John Mason should "pay and satisfy" the judgment and all costs and damages.

The judgment was affirmed by this court, in December, 1823, with costs and damages. Afterwards, John Mason replevied executions, which had been issued for the amount of the original judgment, and for the damages adjudged by this court.

In 1831, this suit (debt) was brought by the personal representatives of Thomas Morrow for the purpose of enforcing the appeal bond. On the trial, the circuit court instructed the jury, in substance, that the appeal bond had been satisfied and discharged by the replevin bonds; and a verdict and judgment were consequently rendered in bar of the action.

(It does not appear that the replevin bonds had ever been satisfied.)

Security in appeal bond, conditioned to "pay" &c. does not discharge his obligation, when upon affirmance of judgment, he replevies the original debt, &c., he must actually "pay."

The instruction thus given cannot be sustained. Although the original judgment, and that for damages, may have been merged in the replevin bonds, and, in that sense, were satisfied, nevertheless, the amount of the judgments had not, according to the condition of the appeal bond, been paid.

The replevin bonds operated only as a collateral security. They did not extinguish or discharge the obligation of the appeal bond. Morrow had a right to proceed on either of those concurrent and independent securities; but nothing short of the collection of the whole amount to which each of them en-

titled him, by a proceeding on one of them, would **KAVENNAUGH** have barred his right to proceed on the other. The object of the appeal bond was to secure the <sup>vs.</sup> **DAVIS.** payment of the debt and damages. The object of the replevin bonds was the same and no more; they could not be deemed a payment of the debt or of the damages, any more than judgments actually obtained upon the judgments for debt and damages could have been considered as a payment. In neither case, would any preexisting and separate collateral security have been affected.

John Mason was to "pay" the amount of the original judgment, and of that for damages. He did not do so; he only gave a new and additional security, which did not operate as an extinguishment or satisfaction of the appeal bond.

Wherefore, the judgment of the circuit court must be reversed, and the cause remanded for a new trial.

*James Trimble, for plaintiff.*

## Cavanaugh vs. Davis.

CHANCERY.

Error to the Christian Circuit; SHACKLEFORD, Judge.

Case 124.

*Injunction. Dismissal of bill. Action at law. Bar.*

Chief Justice ROBERTSON delivered the opinion of the Court.

May 12:

**KAVENNAUGH** filed a bill in chancery against **Davis**, enjoining some small judgments, and praying a set off for the use of two slaves, (Violet and Joe) which, as the bill averred, he (**Davis**) had enjoyed in consequence of the loan of about \$100. The injunction having been dissolved by the order of the circuit court, **Kavenaugh** voluntarily dismissed his bill before an answer had been filed. Afterwards, he brought this action of assumpsit for the use of the slaves. On the trial, upon the general issue, **Davis** relied on the suit in chancery as a bar to any recovery, and the circuit court having instructed the jury to that effect, in substance, verdict and judgment were consequently rendered against the plaintiff.



KING  
 vs.  
 DICKEN.

Dismissing a bill, after dissolution of injunction, does not preclude complainant from maintaining his action at law, for the demand, set up in the bill; it is no litigation or determination of the rights of the parties.

There is no reason whatever for presuming that the subject matter of this suit had ever been litigated or involved in any other suit, except so far as it had been presented in the bill which we have mentioned; the dismissal of that bill furnished (according to the only rational interpretation of this record,) the only ground for the instruction given by the circuit court, and the consequent verdict of the jury.

The bare statement of the object of the bill, and of the manner in which it was abandoned, is sufficient to shew indisputably that the right to compensation for the use of the slaves had not been concluded or litigated.

After the dissolution of the injunction, the bill was *functus officii*, and the court had no jurisdiction to decree a payment of the sum claimed by the bill.

Wherefore, the instruction was erroneous, and, of course, the judgment must be reversed, the verdict set aside, and the cause remanded for a new trial.

*Crittenden*, for plaintiff; *Morehead*, for defendant.

ASSUMPSIT.

## King vs. Dicken.

Case 125.

Appeal from the Henderson Circuit; M'LEAN, Judge.

*Assumpsit for money wrongfully made under execution.  
 Reversal of decree. Measure of recovery.*

May 12.

Chief Justice ROBERTSON delivered the Opinion of the Court.

THIS appeal is prosecuted to reverse a judgment obtained by Christopher Dicken against Elijah King in an action of assumpsit for money made out of the former by the latter by sales of property under executions on a decree afterwards reversed by this court.

Upon reversal of decree money made in virtue of original decree to be re-

We do not doubt that Dicken was entitled, in consequence of the reversal of the decree, to restitution, not of the property which had been sold, but of the price for which it was sold; nor do we doubt that this suit is maintainable, nor that the proof on the

trial authorized a verdict and judgment in favor of Dicken. But we are of opinion, that he obtained a judgment for a larger sum than the proof entitled him to.

KING  
vs.  
DICKEN.  
funded to the  
defendant so  
far as the pro-  
perty sold  
was his. Proof  
of property in  
another com-  
petent in mit-  
igation:

It seems that one of the articles of property which had been sold under the decree, was a mare, for selling which, William Dicken, who averred that it was his, and not C. Dicken's, afterwards sued the sheriff and obtained a judgment in damages for conversion, by selling it as the property of C. Dicken.

On the trial, in this case, King offered to prove that Christopher Dicken (the appellee) was sworn as a witness in the suit between William Dicken and the sheriff, and swore that the mare was the property of William, and not of him (Christopher) at the time of its sale by the sheriff, and offered also to prove other facts conducing to shew that the mare was not the property of the appellee. But the circuit court, being of opinion that no such testimony was material or admissible, refused to admit it. In this there was error.

If C. Dicken did not own the mare, the law did not imply an assumpsit to restore it or its value to him, but to the true owner only. Both the appellant and the sheriff who, at his instance, sold the mare, were liable to the owner for its value. The owner having asserted his claim, and recovered damages from the sheriff, the appellee cannot be entitled, in assumpsit or in any other form of proceeding, to restitution for any part of the sum for which his execution was credited in consequence of the sale of the mare.

The rejected proof was admissible on the question of proprietorship of the mare at the time of sale.

The judgment cannot be sustained, because it is far too much, unless the appellee had a right to recover the price for which the mare had been sold.

Wherefore, the judgment is reversed, the verdict set aside, and the cause remanded for a new trial.

*Denny*, for appellant ; *Waring*, for appellee.

CHANCERY. **Smith's Executors vs. Bryant's Executors.**

Case 126.

Error to the Garrard Circuit; BRIDGES, Judge.

*Chancery practice. Revivor.*

May 12.

Judge UNDERWOOD delivered the opinion of the Court.

In chancery causes the record should shew every thing necessary to sustain the decree.

Order to revive in name of an executor, without stating that it was at his instance, the record not shewing that he had notice cannot support a decree against him.

THE rule in chancery causes is, that the record must shew every thing necessary to sustain the decree. Upon Smith's death, regularly, the suit should have been revived by bill of revivor in the name of the executor. Instead of doing so, an order to this effect was entered: "ordered, on motion, that this suit be revived, and prosecuted in the name of Isaac M. Myers, executor &c."

It no where appears who made the motion, nor is there any thing in the record shewing that Myers thereafter had notice of the existence of the order. In the defendant caused the entry to be made, and the executor of Smith had no knowledge of it, all subsequent proceedings were *ex parte*, and the decree ought not to be sustained, because it would bar Myers, if he be executor, so long as it remains in force.

As the order does not appear to have been made on the motion of Myers, we think it too vague and uncertain to permit the decree to stand.

Wherefore, it is reversed, with costs, and the cause remanded for a regular revivor of the suit in the circuit court, or for an abatement thereof by the death of Smith.

*Owsley*, for plaintiffs; *Crittenden*, for defendants.

# Hare's Heirs vs. Bryant's Administrator. CHANCERY.

Error to the General Court.

Case 127.

*Decree. Heirs. Personal representative. Parties. Jurisdiction. Statutes.*

Chief Justice ROBERTSON delivered the Opinion of the Court. May 13.  
 Judge Nicholas did not sit in this case.

THIS is a suit in chancery, instituted in 1830, by Samuel Weisiger, as administrator of Thomas Y. Bryant, who died in 1828, against the heirs, known and unknown, of Andrew Hare, deceased. The bill alleges that, in the year 1801, George Hunter and William Hunter, as trustees for Margaret Hare, obtained a judgment in the Lexington District Court against Thomas Todd, executor of the said Andrew Hare, for the sum of £2647 10s. and costs of suit; that Margaret Hare afterwards died, and, by a nuncupative will, devised the said judgment to the said Thomas Y. Bryant; that no part of the judgment had ever been paid; that Todd had no assets; but that a large real estate in Kentucky had descended from his testator, A. Hare, to the children and heirs of the latter, some of whom are alleged to be unknown, and others are described by their proper names, and are averred to be non-residents. The bill seeks a decree *subjecting to the judgment* so much of the said real estate as shall be necessary to pay the whole amount due thereon. *It does not appear that any execution had ever been issued.*

The bill was taken for confessed on a certificate of publication: and, thereupon, the general court decreed that, "*the real estate in the bill mentioned, or so much thereof as may be necessary, be subjected to sale for the payment of the amount of the judgment at law, referred to in the bill, to wit, £2647 10s.*"

To reverse this decree, this writ of error is prosecuted, with a supersedeas.

There are various objections to the decree, some, if not all, of which are fatal to it.

1st. There is a defect of parties. The personal representative of Andrew Hare ought to have been made a party. Unless he had been a party, the

Bill vs. heirs to subject land to judgment vs. personal representative, plaintiff in judgment and defendant must be parties.

HARRIS'  
HEIRS  
vs.  
BRYANT'S  
EXECUTORS.

Land can only be subjected by judgment or decree vs. heirs for the original debt, not to judgment vs. executor or administrator.

decree *subjecting the land to the judgment*, if in other respects proper, could not be sustained. It was equally necessary that the trustees who obtained the judgment, should have been parties. It does not judicially appear that they were parties.

2nd. The land could not be subjected to the judgment against the executor. It could be reached only by a judgment or decree *against the heirs* for the original debt, either upon the covenant or the judgment against the executor. There has been no such judgment or decree against them : and no such decree could be rendered against them in this case without other proof than any contained in this record.

Statute 1827, Session Acts, 158, alone authorizes proceeding vs. heirs where there is no actual service of process, and then requires the allegations of the bill to be proved "according to the rules of evidence in actions at law." Quere, whether stat. 1827, authorize decree subjecting land to payment of damages assessed for breach of covenant prior to Dec. 1792.

3d. As there was no actual service, the statute of 1827 (Session Acts, 158) furnishes the only authority for any judicial proceeding for subjecting the heirs or their estate : and that statute required the complainant in the bill to execute bond for indemnifying any person who might be injured by the decree ; and also declares that no bill authorized by it shall be taken for confessed without answer, but that "*the courts shall require proofs of the allegations, according to the rules of evidence in actions at law.*" There was neither bond nor proof in this case. And, surely, some proof was necessary against the heirs, especially as the bill was not filed until *more than twenty seven years* had elapsed from the date of the judgment, and until after the death of the *cestue que trust and of the intestate of the complainant in the bill.*

Another objection, still more radical, is made to the decree by the counsel for the plaintiffs. They insist that, as the contract on which the judgment was rendered was made before December, 1792, the statute of 1827 should not be so construed as to authorize a decree for subjecting land to the satisfaction of damages assessed for a breach of it. We shall not now decide this point, because there is another objection to the decree which will supercede the expression of an opinion upon a matter so vital to the merits which may be again presented for adjudication in a more regular and *effectual* manner.

4th. The general court had no jurisdiction. Unless all the parties were nonresidents, or unless either the complainant or all the defendants were nonresidents, and the other party a citizen or citizens of Kentucky, the general court had no cognisance of the case: and as the jurisdiction of that court is special, the facts necessary to sustain it must be averred, or must otherwise appear in the record. But in this case there is no allegation that Weisiger was a non-resident or that the unknown heirs were nonresidents.

HARRIS'  
HEIRS  
vs.  
BRYANT'S  
EXECUTORS.

General court  
no jurisdiction where  
some of the  
complainants  
and some of  
the defendants  
are residents  
and some nonresidents; the  
facts to sustain the jurisdiction must  
be averred,  
or appear in  
the record,  
the jurisdiction being special.

If Weisiger had been a non-resident, even then, as the known heirs were non-residents, the general court had no jurisdiction unless the unknown heirs were also non-residents: and if Weisiger had been a citizen resident in this state, the court had no jurisdiction unless *all* the persons constituting the adversary party had been non-residents.—Sneed et al. vs. Noffinger, II Littell's Reports, 80; Lexington Manufacturing Company vs. Dorr, Ib. 256. Banks vs. Fowler, III Ib. 333.

Moreover, if all the necessary facts concerning the character or condition of the parties had been alleged, so as to remove the foregoing objection, there is another which nothing could avoid. Prior to the enactment of the statute of 1827, already referred to, no court in this state had jurisdiction of such a case as this, *without actual service* of process on the non-resident defendants, or some of them. Therefore, the general court had no jurisdiction unless the statute of 1827 gave it. But we are of opinion, that the statute cannot reasonably or consistently be so construed as to extend jurisdiction to the general court in the class of cases for which it provides, and to which this certainly belongs. Exclusive jurisdiction, in such cases, has been conferred on the circuit courts.

Stat. '27 does not give general court jurisdiction over the cases it provides for. Jurisdiction of circuit court is exclusive.

Wherefore, the decree of the general court must be reversed, and the cause remanded, with instructions to dismiss the bill for want of jurisdiction.

*Crittenden and Brown*, for plaintiffs; *Denny and Triplett*, for defendants.



**C A S E S**  
**ARGUED AND DECIDED**  
 IN THE  
**COURT OF APPEALS,**  
 AT  
**THE FALL TERM,**  
**1832.**

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**Present—GEORGE ROBERTSON, *Chief Justice.***  
**JOSEPH R. UNDERWOOD, and**  
**SAMUEL S. NICHOLAS.**

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**Bell's Heirs vs. Barnet.**

Error to the Hardin Circuit; BOOKER, Judge.

Case 122.

*Improvements. Occupant. Commissioner's report.*

Chief Justice ROBERTSON, delivered the opinion of the Court. October 2.

THIS writ of error is brought to reverse a decree for improvements, assessed in consequence of an opinion heretofore rendered by this court. See *Bell's Heirs vs. Barnet*, II J. J. Marshall's Reports, 516.

The decree must be reversed for the following reasons :

1st. The court below erred in not quashing the report of the commissioners, because the plaintiffs had no notice of the time when they met and made

That plaintiff had no notice of the time when com-



BELL'S HEIRS  
vs.  
BARNET.

missioners  
met to assess  
the value of  
improvements  
is good ground  
for quashal of  
of commis-  
sioners' re-  
port.

their assessments. The only notice which was exhibited or relied on, is one to Benjamin Monroe, as agent for the plaintiffs. But there is no proof that he was, at that time or since, their agent, or that he acted as such. The ancestor of the plaintiffs expressed, in his will, a desire that Benjamin Monroe would attend, as a superintendent and manager, to the investigation of his land claims in Green county, and declared, in the same will, that he appointed the said Monroe agent and trustee for himself (the testator) and his children for the purpose of attending to his said land claims. But the title to the land vested in the plaintiffs at the testator's death, and it appears from Monroe's affidavit that, for some years prior to the notice to him, he had ceased to act as an agent, and had notified the defendant of that fact.

The designation of Monroe by the will did not constitute him the agent of the plaintiffs, unless they consented to and ratified the appointment. There is no proof that he ever accepted the appointment, or that they acquiesced in it, unless his affidavit be evidence; and if it be, it also proves that he was not an agent when the notice was given to him. The plaintiffs, notwithstanding the will, had a right to appoint their own agent, or to manage their own concerns without any agent. Monroe had no interest in the land—he was no party to the suit. It does not appear that a notice to him was any notice to the plaintiffs, or that they ever had notice, actual or constructive, direct or indirect.

2nd. The court erred in not quashing the report for exorbitance. The facts and principles bearing on this point may be seen by recurring to the case, *supra*, (in J. J. Marshall.)

The commissioners have again assessed \$25 an acre for clearing land; and, therefore, allowed \$3725 for clearing 149 acres! To fortify and uphold this extraordinary assessment, sundry depositions have been filed, in all about eighteen; in a majority of which the opinion is expressed, that \$25 an acre is not too much to allow for such clearing. They describe the timber as thick and heavy and chiefly beech, and the clearing as having been, in the first

BELL'S HEIRS  
VS.  
BARNET.

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instance, "smooth." They also state, that the common mode of clearing such land in the same county has been to belt or otherwise kill the larger beech trees; and that the clearing of such land, in the latter and usual mode, was worth from \$8 to \$12 an acre. It appears, also, that the whole tract of 300 acres, as cleared and improved, was worth not more, at the maximum, than \$3000, and perhaps not more than \$2400, although the improvements, as assessed by the commissioners, were alone worth \$4262!

We do not doubt the correctness of the opinion in *H. J. J. Marshall*; unless we erred in allowing for ameliorations since 1816; and in allowing more than the ameliorations prior to that time.

However, if that opinion be, in those respects right, and we are still disposed to think it is, it is as favorable to the defendant as he could expect or in conscience ask: and, therefore, on his part, more should not be required or permitted than what is reasonable and just according to the standard established by common opinion, common usage and common sense. That standard has not governed this case. The land is worth no more to the plaintiffs than it would have been had it been cleared by the ordinary process—it will have yielded them but little if any more. And if the defendant chose to adopt an unnecessary and unusual mode of clearing, he is not, therefore, entitled to whatever it may have cost him. If he had extirpated all the stumps, such a process would have cost him much more than even that which he adopted; but would he be entitled to the reimbursement of *all* that he thus unnecessarily expended, or to full compensation for all the labor employed in such an unusual and reckless manner? Surely not.

The utmost of his equitable right, in this particular, is the *ordinary* value of clearing in the *ordinary* way; and he should be charged with rents, in a similar manner, according to the *ordinary* value of such land cleared in the *ordinary* mode. This will be a heaping measure of justice to him—for he cleared the land without the knowledge or direct privity of

Although occupant has gone to *extraordinary* expense in the clearing and improvement of land, he is not entitled to an extraordinary compensation therefor, but is only entitled to the *ordinary* value of clearing in the *ordinary* way, and such occupant should be charged with rents, in a similar manner, according to the *ordinary* value of such land cleared in the *ordinary* way.

HARRIS  
vs.  
KIDWELL &c.

Allowance by commissioners, of three dollars and fifty cents per tree for the mere "*planting*" of an orchard, is exorbitant.

How to ascertain the value of apple orchard put upon the premises by occupant, and the quantum of rent that occupant should pay for the land on which the orchard stands.

the true owner)—and it is as much as the former opinion contemplated.

3rd. The commissioners have allowed \$3 50 cents a tree, for "*planting*" sixty apple and two pear trees. The report does not shew that any rent, or if any, how much, has been allowed for the use of the trees or of the ground on which they stand. The price allowed is undoubtedly too much for *planting*. This is evident from the proof.

The rational, just and legal mode of adjusting such a matter is to allow the customary price for setting the orchard, and for pruning, when pruning may have become necessary, and *had been done*—and then to charge, for rent, the real annual value of the use of the ground as arable ground, whilst it was arable, and the annual value of the use of the orchard and of the ground of a fruit bearing orchard, after it became such.

4th. The report presents an aggregate of rents without particularizing. It would be desirable to know how much was charged for each year, and for what years, and for what land and improvements; otherwise it will be impossible, in such a case as this, to decide whether or not the commissioners have made their assessments according to the rules and principles prescribed to them in the former opinion.

Wherefore, the decree is reversed, and the cause remanded for further proceedings in conformity as well to this as the former opinion.

*Haggin*, for plaintiffs.

CHANCERY.

Case 129.

October 2.

## Harris vs. Kidwell &c.

Appeal from the Madison Circuit; FRENCH, Judge.

*Specific performance.*

Judge UNDERWOOD delivered the opinion of the Court.

ON the 10th of February, 1818, Bowles Harris, executed an obligation, binding himself to convey 100 acres of land to John Henson, on or before the 10th of August, 1820. On the same day,

Henson executed an obligation, binding himself to pay Harris \$400 (being part of the consideration for the land) on or before the 10th of August, 1820.

HARRIS  
vs.  
KIDWELL & C.

Henson, on the 19th of August, 1819, assigned the bond on Harris, for the title, to Levi Kidwell. On the 14th of December, 1819, Harris assigned the bond on Henson, for \$400, to William Harris, in payment for a tract of land, which he agreed to convey to his assignor.

Bowles Harris having failed to make the title, on the 10th of August, 1820, according to the stipulations of his bond, Kidwell, the assignee, instituted an action thereon, and recovered \$646 74, besides costs. Bowles Harris filed his bill, enjoining the collection of this judgment. He asked a specific execution of the contract, and if that could not be granted, he prayed that the amount due on Henson's bond, for \$400, and which he alledged had never been paid, might be set off against so much of the judgment. He charged that Henson and Kidwell were both insolvent.

Kidwell answered, resisting the specific execution of the contract, upon the ground that the complainant had no title, either legal or equitable, and that the land had depreciated in value. He resists the set-off, upon the ground that the complainant did not own the \$400 bond, having assigned it to William Harris. He denied the insolvency of Henson and himself, as charged.

It appears that William Harris filed his bill, after he became the assignee of the bond, for \$400, on Henson, with a view to subject the land sold by Bowles Harris to Henson, to the payment of the debt. But, finding as he alleged in an amendment to his bill, that Bowles Harris had no title, and that the lien was worthless, he endeavored to charge Bowles Harris personally, as the assignor. Bowles Harris made his answer a cross bill, and endeavored to perfect his title. William Harris dismissed his bill, and thereafter Bowles Harris dismissed his cross bill, and these suits thus terminated without deciding any thing.

HARRIS  
 vs.  
 KIDWELL &c.

William Harris then instituted an action of ejectment, to recover the land which he had agreed to convey to Bowles Harris, in consideration, of the bond, for \$400, on Henson. Bowles Harris filed his bill, enjoining the proceedings in the action of ejectment, and prayed for a specific execution of the contract. William Harris resisted this in his answer, in the nature of a cross bill, upon the ground that the \$400 bond on Henson, had not been paid, and that he had been induced to accept it, in consequence of fraudulent representations made by Bowles Harris. Bowles Harris, in answering the cross bill, denies making any fraudulent statements, and insists that he is not liable as assignor of Henson's bond. This suit is undetermined, and yet pending in the Estill Circuit Court.

Chancellor  
 will not by  
 enforcing a  
 specific exe-  
 cution of the  
 contract, re-  
 lieve against  
 a judgment at  
 law fairly ob-  
 tained thro'  
 the negligence  
 of the cove-  
 nantor to con-  
 vey.

We cannot relieve Bowles Harris from the effect of Kidwell's judgment by a specific execution of the contract. When the judgment was obtained, Harris had no title, and did not procure it for some years afterwards. He admits in answer to William Harris' bill, that the land had depreciated in price, and seems to reproach him for not enforcing a lien on the land, when it would have sold high. We cannot, therefore, under the doctrines established in the case of *Oldham vs. Woods*, 11 Mon. 47, relieve Bowles Harris from the consequences incident to the violation of his covenant, by executing the contract.

There is no ground for allowing the set-off claimed by Bowles Harris. The note on Henson for \$400 is not his. Whether he will ever be liable to his assignee, for the amount, is a matter not settled. It is a question litigated in the pending suit between him and William Harris, in the Estill Circuit Court, and is not fairly and properly presented for adjudication in this cause. If, as he contends, he is not liable as assignor, then he will obtain a title for the land sold him by William Harris. If, however, he should be held liable, or that contract should be rescinded, he will be thrown upon Henson for indemnity. If Henson is insolvent, and he cannot make the money out of him, or out of Kidwell, as a debtor of Henson, after he shall have become entitled to the bond for

\$400, by satisfying William Harris, then he must sustain the loss, because of the attitude he has voluntarily assumed. GRIFFITH  
vs.  
HUSTON &c.

The failure to decree the possession to Bowles Harris, is not erroneous, because it is in proof that Kidwell has abandoned the possession, and that it is within the power of Harris to resume the possession whenever he pleases. The amount allowed for rents, is as large as the proof will justify.

We perceive no ground to disturb the decree; wherefore, it is affirmed with costs and damages.

*Hanson*, for appellant; *Turner*, for appellee.

### Griffith vs. Huston &c.

EJECTMENT.

Error to the Daviess Circuit; McLAN, Judge.

Case 130.

*Estoppel. Effect of after-acquired title. Testimony. Parol. Subscribing witnesses. Deed, execution of. Contents, how proved. Adversary possession. Husband and wife. Joinder. Right of entry tolled by descent. Disseizin.*

Judge NICHOLAS delivered the opinion of the court.

October 2.

THIS was an action of ejectment, in the name of the appellant as lessor, on the trial of which a verdict and judgment were rendered against him.

In support of his claim he gave in evidence a patent of 1799, to John Handley, (for 7500 acres) covering (400 acres) the tract sued for, and in the possession of the defendant, Huston, a decree against the heirs of Handley, a *fi. fa.* issued thereon, under which the 7500 acres were sold and conveyed by the coroner in 1826 to one Crow, which were conveyed by a deed, dated in 1827, from Crow to Griffith, and a will of Shoemaker, by which the 400 acres were devised to his daughter, then the wife of defendant, Huston. He then proved that Handley settled on the 7500 acres in 1802, and lived there till 1816, when he died, and when Griffith took possession and has lived there ever since. That Handley left four children of whom the wife of Griffith was one, with

GRIFFITH  
vs.  
HUSTON &c.

whom he intermarried before Handley's death. He then introduced witnesses whose testimony conduced to prove that previous to Shoemaker's settlement on the land in contest, there had been no settlement or improvement there; he also read a deed from Samuel, one of the sons of John Handley, to himself and George Handley, for all the interest of Samuel in the estate of John Handley.

The defendants then read a deed from William Worthington to Shoemaker for the 400 acres in contest, dated in March, 1813, and proved that Shoemaker and the Hustons had held the possession thereof ever since. They offered to read a certified copy of a deed for the same land from John Handley to Worthington, dated in 1796, which was proved by subscribing witnesses in the county court in 1800. The court rejected the copy, but permitted parol testimony of the declarations of Handley of having sold to Worthington, and other parol testimony conducing to shew the same facts. For permitting which, plaintiff excepted, and moved the court to instruct the jury:—

1st. That if Handley conveyed the land in contest in 1796, before the issuing of his patent, and he was not then in possession of the land, but the same was vacant and in possession of no one, that his deed conveyed no title to Worthington.

2nd. That the execution or contents of any such deed could only be legally proved by some of the subscribing witnesses, or some one who had seen the deed and knew the hand writing of the grantor, or some one of the subscribing witnesses.

Title afterwards acquired, by vendor, without title, enures to vendee.

The first of these instructions the court properly refused to give; for though Handley had not title at the date of his deed, yet when he obtained title, it enured to the benefit of his grantee, and all persons claiming under him were estopped to deny he then had title.

Whether the court was also correct in refusing to give the second in the terms in which it is couched need not be determined; for the testimony which it was framed to meet, the court certainly erred in permitting to be given to the jury.

There was no legitimate foundation laid, by proof of the loss or destruction of the deed, to authorize the introduction of secondary and inferior evidence, either of its execution or contents. The grantee, Worthington, was a defendant to the suit, and the least that could have been required, was an affidavit from him of its accidental destruction, or if lost, that he had made due and proper search for it without avail. In the absence of such preliminary proof the presumption is, that the original was in the possession of Worthington and of course, he was bound to produce it. After proof of the loss or destruction of the deed, we think Handley's verbal declarations and acknowledgments, might be legitimately used in aid of other proof and circumstances to shew its execution and contents. Should it be proved that there were subscribing witnesses, they should be produced, or their absence accounted for. But, upon their failure to recollect its execution or contents; as appears to have been the case on the former trial, the party will by no means be precluded from supplying the deficiency of their testimony by other legitimate proof. A party's rights cannot be made to depend upon the recollection of a subscribing witness, after the lapse of upwards of thirty years.

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Contents of a deed cannot be proved, by parol, unless affidavit of its loss or destruction; then execution and stipulations to be established by subscribing witnesses if to be had, if not by other legitimate testimony, declarations of grantor &c.

The court, at the instance of the defendants, gave the jury the following instructions, in substance:

1st. That if Shoemaker was in possession, claiming under the deed from Worthington, at the time of the coroner's sale, none of the land in contest passed by the coroner's deed.

2nd. That Griffith could only recover the interest that passed to him by the deed from Samuel Handley, that is, one eighth.

3rd. That if Handley took possession of the 7500 acre tract, in 1802, and continued in possession thereof till 1813, when Shoemaker took possession of the land in contest, claiming it as his own, and if Shoemaker's possession was continued for more than five years and till his death, that the plaintiff's right of entry was barred and they should find for the defendants.



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The propriety of these instructions are called in question by the assignment of errors. We have not literally transcribed them, but have only stated enough to shew the legal points ruled or intended to be ruled by the circuit court. The instructions as given are very defective in their form, assuming facts and deducing inferences, purely within the prerogative of the jury: but, as these defects are so obviously the mere result of carelessness or haste, they need not be pointed out.

Land held in  
adversary pos-  
session, not  
subject to sale  
under execu-  
tion.

The first instruction was properly given. Land held in adversary possession was not the subject of sale under execution. *McConnell vs. Brown*, V Mon. 480.

Husband can  
recover in  
ejectment  
land of his  
wife's without  
joining her in  
demise.

The propriety of the second is not so obvious. We cannot see why the plaintiff's recovery should have been absolutely restricted to the eighth derived from Samuel Handley. He had never parted with his own fourth which he had in right of his wife and for which he could undoubtedly sue in his own name without joining her. From any view we have of the subject, the court erred in giving that instruction.

Upon the question of law arising out of the third instruction, we concur mainly, but not entirely in opinion with the circuit court.

If estate de-  
vised, same  
with that  
which devisee  
would take as  
heir, the es-  
tate passes by  
descent not  
by purchase.

The facts appear to present a complete case, (such as the books tell us must now be of rare occurrence) where the proprietor's right of entry is barred by a descent cast, and he is driven to his *droiturel* action. They shew a disseizin of Handley by Shoemaker, a peaceable continued possession by the latter for five years, and then by his death, a descent of the land cast upon his heir.

The estate devised to Mrs. Huston by the will of Shoemaker, being precisely the same as she would have taken as heir, according to a long established and familiar rule of law, she takes by descent and not by purchase.

At common  
law, entry  
tolled by de-  
scent cast by

By the common law, if an abator, intruder or disseizor died in peaceable possession, the descent to his heir took away from the true owner his right of en-

try, although such death happened recently after the acquisition of the land. But, by the statute of XXXII Hen. 8, c. 33, re-enacted in this State, I Digest, 467, it is provided, that the dying seized of the disseizor shall not toll the right of entry, unless the disseizor had peaceable possession for five years next after the disseizin, without entry or continual claim by the person entitled. The statute contains no saving, on account of any disability on the part of the claimant but, by the common law the entry was not tolled where the claimant at the time of disseizin and death of the disseizor, labored under the legal disability of infancy, coverture, imprisonment, or being beyond seas.

Where, as in this case, the disseizee labored under no disability at the time of the disseizin, but died previous to the lapse of five years and before the descent cast, leaving his estate to parceners, some of whom labored under disability, the books, so far as we can ascertain, have not expressly determined, whether the right of entry is saved to the parceners or not.

The question would not arise in this case upon the disability of Mrs. Griffith, who was covert at the death of Handley. For it is said by Littleton, sec. 403, that if husband and wife, in right of the wife, have title and right to enter into lands and a descent thereof is cast upon the heir of the disseizor, the entry of the husband is taken away, though upon death of the husband the wife may enter.

But, one of the four heirs of Handley was a Mrs. Wheelock, who was covert at the death of Handley. The bill of exceptions does not shew when she became discover, but if it should turn out on a subsequent trial that she became so after the death of Shoemaker, the question will arise, whether the right of entry is saved as to her, and if so, then whether the saving of her right saves that of the other parceners also.

Without determining in this case what would have been the effect, if all Handley's heirs had been under disability at the time of his death and had so continued till the death of Shoemaker, we think that in an-

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statute, I Dig.  
467, not tolled  
unless five  
year's possession by disseizor next  
after disseizin  
without entry  
or continual  
claim by person  
having title. No saving in statute,  
otherwise at  
common law.

Husband and wife have right of entry into lands in right of wife of which they have been disseized, descent casts, takes right of husband.

Disability of one parcener does not waive right of entry to such as la

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born under  
no disability  
when the  
right accrued.

alogy to the construction which has been given to the saving in the statute of limitations in the cases of *Marsteller vs. McLean*, VII Cranch, 156; and *Dickey vs. Armstrong*, 1 Mar. 39, it must be determined that the plaintiff cannot obtain the benefit of the saving in this rule at common law, by reason of any disability on the part of Mrs. Wheelock. The principle upon which the decisions in those cases are based, seems to have direct application to this, and we feel authorized to say, for the same reason, in the absence of express authority, that let the discovery of Mrs. Wheelock have happened when it may, it cannot save the right of entry of the plaintiff Griffith.

Disseizin, is  
the wrongful  
ouster of the  
rightful ten-  
ant, and an  
usurpation of  
the freehold.  
Extent of dis-  
seizin the ac-  
tual occupan-  
cy of disseizor  
by inclosure.

It still remains to be determined to what extent the entry of Handley's heirs upon the 400 acres is tolled. This must necessarily depend upon the extent to which they were disseized.

Without entering upon the vexed question as to what amounted to a disseizin as originally understood at the common law, the true solution of which Lord Mansfield seems to have thought, 1 Burr. 60, was lost in the obscurity of antiquity, we will content ourselves, with a definition of disseizin as now understood and as the law has been acted on for centuries. According to Littleton, Coke &c. a disseizin may be said to be the wrongful ouster of the rightful tenant from the possession and an usurpation of the freehold. There are many acts which do not of themselves, amount to a disseizin, yet which for the purpose of affording a summary redress, the courts have permitted the party injured to elect to consider as a disseizin. But, for the purposes of the doctrine of descent cast, there must be an actual disseizin, not one which is merely so by construction or at the election of the party injured. *Smith vs. Burtis* VI John. 216. A bare entry, says Holt, 1 Salk. 246, without an expulsion, makes such a seizin only that the law will adjudge him in possession that has the right, but it will not work a disseizin, without actual expulsion. (See *Clark vs. Courtney*, V Peters, 320.) The disseizin of Handley and his heirs by Shoemaker could have extended, therefore, no farther than the latter was actually possessed to the exclusion of

the former. How far this was, our own books, furnish a most satisfactory and conclusive answer. They determine that it was circumscribed by his actual enclosure. To that extent only was the right of entry of Handlev's heirs tolled by the descent cast. The court consequently erred in not so restricting it in the instruction given to the jury.

Judgment reversed, with costs, and cause remanded for a new trial, and further proceedings, consistent herewith.

*Richardson*, for plaintiff; *Crittenden*, *Morehead* and *Brown*, for defendants.

### Lansdale &c. vs. Cox.

Error to the Nelson Circuit; BOOKER Judge.

*Limitation. Statute of Motion. Chancellor.*

Judge NICHOLAS delivered the opinion of the Court.

JAMES COX and Richard Lansdale became surities of Shanks in an injunction bond, upon which judgment was afterwards rendered against Cox, as surviving obligor, and the judgment satisfied by Cox's surety in a replevin bond. Cox afterwards, on the 22d March, 1822, paid his surety. He then obtained judgment against Shank's heirs, and by execution made part of the money. For the purpose of obtaining contribution for the residue, Shank's estate being insolvent, he brought his motion against the administrators and heirs of Lansdale and recovered a judgment, which was afterwards, on the 21st June, 1828, reversed in this court; and the motion directed to be dismissed, on the ground that the statute did not authorize a joint motion against the heirs and personal representatives. On the 18th August, 1828, he filed his bill, with the same object, against the administrators and two of the heirs of Lansdale, two others of his children and heirs being then dead.

The defendants plead the statute of limitations and insisted that the heirs of one, and devisees of the

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other of the two deceased children, were necessary parties, and that they should be brought before the court.

On the 29th June, 1829, Cox filed an amended bill, bringing before the court as defendants, the children and heirs of Levi Brashear, deceased, who had married Camilla, one of the deceased children of Lansdale, but without charging that they were the children or heirs of said Camilla.

The circuit court, on final hearing, dismissed the bill as to the heirs of Levi Brashear, and rendered a decree against the other defendants, as administrators and heirs of Lansdale to be paid in notes of the bank of the Commonwealth, from which they prosecute this appeal.

The principal question made here, is, whether the complainants demand is barred by the statute of limitations. This involves a point of some novelty, and much importance, and which, so far as we are advised, has never before been, directly adjudicated upon.

It is contended that a suit by motion does not fall within the terms of the proviso contained in the sixth section of the statute of limitations, so as to save the remedy in any common law action, and consequently the complainant must be barred.

Whether a suit by motion falls within the terms of the proviso, contained in the sixth section of the statute of limitation, so as to save the remedy in any common law action. *Que-re.*

That section provides, that if in any of the said actions or suits, judgment be given for the plaintiff and the same be afterwards reversed, the plaintiff may commence a new action or suit within one year after the reversal. A motion is nowhere mentioned in the previous part of the statute, and of course the reference to *said actions and suits* does not literally apply to or embrace a suit by motion. Whether, however, it does not so far fall within the spirit and equity of the proviso, as to authorize the courts, in saying, that the remedy in such case shall be preserved for the purposes of another common law action, we need not now determine. For the question, so far as it applies to a court of chancery, can be settled on grounds, which might not necessarily be deemed to embrace an action at law.

A bill in equity is itself not within the statute. LANSDALE  
&c.  
 It is only by an equitable construction of the statute, and for the purpose of making the rules of vs.  
COX.  
 proceeding in chancery harmonize as far as practicable with those of courts of law, that it is allowed as an available defence at all before the chancellor. It is no longer a matter of discretion with him, to allow the plea of the statute or not. The repeated adjudications upon the subject, have taken away this discretion, and make it an inflexible law of the court, that the plea must be allowed, where and as it has heretofore been done. But it is still nevertheless true, that originally, when the rules of prescription with their exceptions as laid down in the statute, were adopted by the chancellor, it was then matter of discretion with him, whether upon principles of general policy, he would adopt them or not. When therefore a new case arises, where no previous adjudications have established a rule and law of the court, is it not still within his discretion to test such new case by a liberal exposition of the statute according to its equity, spirit, and obvious policy, rather than by a literal adherence to the mere import of its very letter? The legislature in failing to mention bills in equity in the statute, did so, either from the opinion that it was wrong to prescribe any limitation against them, or from a belief that the courts would ingraft its spirit upon an equitable jurisprudence, without any express mention of them. The latter is much the most probable conjecture, as to the true reason for the pretermission. If it was left to the courts to adopt the statute or not, the mode of its adoption was also certainly confided to them. Otherwise it is impossible, satisfactorily, to account why it does not expressly include bills in equity. And if it be conceded, that a discretion was allowed the courts, as to the manner of its adoption, there cannot be a doubt that the legislative intention will be best fulfilled, by framing the chancery rules of prescription according to the spirit and policy of the act.

In an anonymous case, 1 Vern. 73, the chancellor is reported to have said, that a man sued in chancery, and nending the suit, the statute of limitations  
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run against his demand, and his bill was afterwards dismissed for want of jurisdiction, the court would preserve his right by enjoining the defendant from pleading the statute in an action at law.

The courts of law themselves, have indulged a latitude of construction, for the purpose of bringing cases within its inhibition, where they were not strictly within the letter of the statute, fully equal to what is here contended for. Witness the case of *set off*. The courts have applied the statute, though there is no warrant whatever therefor in express terms. A plea or notice of *set off* was deemed to fall within its mischief, and was therefore brought within its remedy. So also in England, where the action was brought in time, but abated after the running of the six years, by the death of either party, the courts, upon an equitable construction of the statute, allowed the suit to be renewed within a year, by or against the personal representatives. *Balan. on Lim.* 106.

Adopting such rule for our guide here, there is no difficulty in ascertaining the spirit and policy of the sixth section. Where a party had so far manifested a bona fide intention to sue for his demand, within the time prescribed, and the remedy he might select was so far sanctioned that he obtained judgment before an inferior tribunal, it was thought unreasonable that time should run against him whilst in the pursuit of his right, when it should afterwards be ascertained in this court, that he had mistaken his remedy. Besides, the judgment of a court was deemed such a solemn and authoritative recognition of his right, as rescued his claim from that doubt and imputation which the lapse of time was otherwise calculated to cast upon it. A claim so circumstanced, was deemed not properly to fall within the general mischief, against which the statute was intended to provide, and was therefore rescued from its operation.

Party sued by motion before the lapse of five years, and after the lapse

In this case the plaintiff within time sued by motion, obtained his judgment in the circuit court, which was afterwards with much doubt and hesitancy reversed in this court, because he had mista-

ken his remedy ; because he ought to have brought either an action of assumpsit, or bill in equity. This claim comes as fairly and fully within the spirit and policy of the proviso contained in the sixth section, as if he had brought an action of debt, and the same result had taken place. The circuit court did right in sustaining his bill, notwithstanding the plea of the statute.

The court was also certainly right in dismissing the suit as to the children and heirs of Levi Brashear, they are not shown to have been the heirs of Camilla Brashear, nor that they received through her, any real estate, that descended to her from Lansdale, so as to charge them as his heirs.

But we think it equally clear that the objection for the want of proper parties, is well taken. The heirs of Camilla and Clarissa, the two deceased daughters of Lansdale, and the devisees of Clarissa, should have been brought before the court. If any of the real estate which descended from Lansdale to Camilla and Clarissa, descended to their heirs, or passed to the devisees of the latter, they are clearly responsible for the debts of Lansdale, and should be brought before the court, to bear a proper share of the burthen of this claim. See Bac. Ab. title Heir; II Sand. 7, note 4 ; Dyer, 368 ; Waller vs. Ellis, II Mun. 88.

If the debt was paid by Cox, in bank paper, its value at the time of payment, should be ascertained, and the decree therefore, with interest, should be rendered in lawful money.

Decree reversed, with costs, and cause remanded, with directions to permit the complainant, to bring before the court, the heirs of Camilla Brashear and Clarissa Lansdale, and the devisees of said Clarissa, and upon his failure to do so within a reasonable time, that his bill be dismissed without prejudice &c.

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of five years  
his motion  
was dismissed  
-ed, he then  
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year from the  
dismissal of  
his motion fil-  
ed his bill in  
chancery set-  
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same claim,  
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comes within  
the spirit and  
policy of the  
proviso con-  
tained in the  
sixth section  
of the statute  
of limitation,  
and therefore  
was not barr-  
ed.



**CHANCERY. Cooper and Wife vs. Fisher and Smith.**

Case 132.

Error to the Garrard Circuit; BRIDGES, Judge.

*Sureties. Giving time. Discharge.*

October 3. Judge NICHOLAS delivered the opinion of the court.

Legatee and executor adjusted the sum due; legatee accepted note of executor, payable one day after date, for the amount; no further stipulation, nor agreement to give time or not to sue; failing to coerce the money from the executor, legatee sued securities in executor's bond, adjudged and decreed upon their bill filed, that this was not such a giving of time or indulgence, as discharge the securities.

COOPER, in right of his wife, being entitled to a legacy under the will of her father, came to an adjustment with the executor as to the amount due, and took his note therefor payable one day after date. Failing to make the money out of the executor by suit, he brought his action against Fisher and Smith, as the sureties of the executor in his official bond. They then filed their bill with injunction against him, alleging the settlement was made without their privity or assent, and that Cooper gave a receipt to the executor for the note as for the amount of the legacy. On final hearing, the court perpetuated the injunction.

There was some controversy as to the genuineness of the receipt; but we deemed it unnecessary to determine either its genuineness or its effect. For if genuine, and taken in connexion with the note, it amounted to payment, that matter could avail the sureties at law, and there was no need for resort to the chancellor.

Indeed, this ground was waived in argument, and the only point relied on for sustaining the decree, was that the sureties were discharged by reason of the indulgence extended to the executor, in taking his note payable one day after date.

Such a case as this could never have originated the rule which discharges a surety for indulgence extended to the principal. The amount of indulgence is so small, and the chance of prejudice to the surety so very remote, that it could never have formed the original basis of such a course of decision. It is, nevertheless, a question of some difficulty to determine, whether the rule, as adopted, and the reason and principle of its adoption, do not extend to and embrace this case.

From the mass of adjudication and *dicta* on this branch of the law, it is exceedingly difficult to extract governing principles, for the test of new cases,

which shall at once be reconcilable with each other and with all those *dicta* and adjudications. The cases, arising at intervals before different judges, each seems to have been anxious to vindicate the intrinsic equity of the principles upon which the surety was relieved. Hence opinion after opinion is crowded with all the reasoning, which had ever before been used for discharging a surety in such like cases, without any careful attention to their immediate application to the case in hand. Even a casual review must satisfy any one, that this is strictly true with regard to the so often repeated argument of the right of the surety or endorser, immediately to pay the bond or bill and pursue the principal or acceptor; also, to the argument, that the contract must not be varied. Both arguments are good, and each conclusive of itself, where it applies. But the foisting them in so often, where they have no application, has thrown the subject into almost inextricable confusion.

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We will venture to extract a few principles, which, we trust, will not merely bear the test of strict scrutiny, but will measurably serve, by being kept in mind, to extricate the subject from the thrall of the *dicta* scattered through the books.

There are three substantive, distinct grounds for relieving the surety, which, though intimately connected, are not necessarily blended together, each constituting, *per se*, a ground of relief.

1st. The creditor must not vary the original contract with the principal, without the assent of the surety. For it is no longer the contract by which the surety agreed to be bound, and it is therefore immaterial whether the variation be for his benefit or prejudice.

2nd. He must not disable himself from suing the principal, at any time, when by the terms of the original contract, he would otherwise have had a right to sue. Because he thereby suspends an essential right of the surety, to pay the debt, and take his recourse against the principal; or, by resort to chancery, to compel the creditor to sue the principal.

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8rd. He may indulge the principal, but he must not do it upon any "settled or binding contract for that purpose." Because the surety is or may be thereby prejudiced.

To vary the original contract, or disable himself from suing, the new contract must be adequate thereto, and based upon sufficient consideration. *Unumquodque dissolvitur, eo modo quo colligatur.* With this explanation, the first and second rules require no elucidation or vindication.

As to the third rule, the distinction seems to be, between indulgence, proceeding from mere delay or negligence in failing to sue or demand payment, and that which is purposed and based upon an express agreement to indulge. For though mere delay to sue might be prejudicial to the surety, yet the courts could not relieve him on that account merely, because the creditor was not bound by the terms of his contract to the exercise of any active diligence against the principal. But indulgence given, upon an express agreement to indulge, without the assent of the surety, was considered as a sort of *mala fides* towards him, as highly calculated to prejudice his interests by relaxing the exertions of the principal to satisfy the debt, and therefore entitling the surety to relief. Some of the earlier cases seem to have gone upon the ground, that it made no difference whether this agreement to indulge was verbal or written, upon consideration or not. Mr. Chitty, in the first editions of his treatise on bills of exchange, only ventured to suggest it with a *perhaps*, that a consideration was necessary to such agreement. In his sixth edition, page 296, he has struck out the *perhaps*, upon the authority of the case of Arundel Bank vs. Goble, decided in the King's bench in 1817, and now states the law to be that, an express agreement not to sue, but without consideration, and without taking any new security, being *nudum pactum*, will not discharge the endorsers of a bill. In the cases of Fulton vs. Mathews, XV John. 433, and McLemore vs. Powell, XII Wheaton, 554, it is decided, that a giving time to the principal or acceptor, upon an express verbal agreement to give time,

but without consideration, would not discharge the surety or endorser. The courts had probably become alarmed at the great number of cases where sureties were demanding relief, and in the latter determinations, were no doubt influenced by the danger of suffering solemn contracts "in writing, to be impaired by careless, idle or misrepresented conversations." It is probably to be regretted, that a sufficient consideration for the agreement to indulge, to make it obligatory on the principal, had not been required in all cases. But such has not been the course of decision.

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In the leading cases of *Nisbet vs. Smith*, and *Rees vs. Berrington*, in England, and that of *Norton vs. Roberts*, IV Monroe, 492, there is no consideration shewn for the creditor's agreement to indulge. In *Rathbone vs. Warren*, X John. 587, where a plaintiff had made a *written* agreement, without consideration, with a defendant against whom he had judgment, that he would not issue execution against him for the purpose of fixing the bail, until after a certain day; the bail not having assented to the arrangement, were held to be discharged. *Chitty*, page 292, says, "if the obligee of a bond, with surety, without communication with the surety, take notes from the principal, and give further time, the surety is discharged. The taking of a bond or any security, payable at a future day, from the acceptor of a bill, or maker of a note, without the assent of the other parties thereto, would discharge them from liability." For which, he cites various adjudged cases. The ground of determination in *Arundle Bank vs. Goble*, was that there was no *fresh security taken*, and no consideration paid the holder for the agreement, yet that agreement was in writing. However the law may be, whether consideration be necessary or not, where the agreement is in writing, it seems settled, and the case of *Morton vs. Roberts* is well supported by authority, that where the indulgence given is accompanied with the reception of a new security, whether of the same or inferior degree, that the surety is discharged, unless he be privy to the engagement. But the bare reception of a new security, without indulgence, upon an agreement to

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indulge, will not discharge the surety, any more than an indulgence given upon an agreement to indulge, without consideration or taking a new security.

In this case the contract was not varied, nor did Cooper disable himself from suing on the executor's bond; for there was no contract, express or implied, on sufficient consideration, to produce either the variation or disability.

Did he, then, indulge the executor, under an agreement to indulge, within the spirit and reason of the cases? We think not. We very much doubt, whether the transaction between Cooper and the executor, was either a giving of time, or an agreement to give time, within the meaning of the books. It does not essentially differ from a stated account with an acknowledgment of the balance due, or a due bill or an acknowledgment of debt due on demand. Suppose, after settling and ascertaining the balance, the executor had said, wait with me an hour, I will procure the money and pay you, or wait until tomorrow and I will then pay, to which the other agreed—would a parol arrangement of this sort have absolved the sureties? We fear we should greatly shock the good sense of the community were we so to declare. There is no substantial difference between the cases supposed and the one under consideration. All the books, and especially the earlier cases, lay much stress upon the injury that does or might ensue to the surety from the indulgence given. That is the undoubted reason for the relief in all this class of cases. Without the accompanying idea of prejudice to the surety, there is no basis of reason, law or justice for his relief. Once place it on the foot of injury to him, and then there necessarily must be proof of actual injury sustained, or at least a possible chance of its occurring.

It would be wholly irrational to infer any prejudice to the sureties from such an arrangement as this. The bond had been entered into twenty years before, and the legacy was probably some time due. Even were we to infer, from the taking such a note, an agreement to wait until next day, no presumption

of injury to the sureties could arise therefrom. In commercial cities and in commercial affairs, a day may be of importance. The special juries in Westminster Hall, stoutly maintained it for some time, in opposition to the courts, that a check on a banker, must be presented within the hour. Even in our own state, where a day is deemed material as to the time of giving notice of the dishonor of a bill of exchange, a day's indulgence might be held fatal. But it would be better calculated to promote mischief than to do good, to apply such a rule to all cases arising in an agricultural community like ours, and especially to the cases of guardian and ward, executor and legatee.

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We are fully aware of the impropriety of a variable or fluctuating rule on this or any like subject, where it can be avoided. We are also duly sensible, how greatly it would relieve us from a disagreeable responsibility to curtail our own discretion to say at once, that a moment's indulgence is as vitiating, as that for a whole year. But this, like most other rules of law, must be expounded according to its spirit and its policy.

The decree must be reversed, with costs, and the cause remanded, with directions to dissolve the injunction and dismiss the bill.

Owsley, for plaintiffs; Crittenden and S. H. Anderson, for defendants.

## Nelson's Heirs vs. Boyce &c.

CHANCERY.

Appeal from the Mercer Circuit; KELLY Judge.

Case 133.

*Mortgage. Lien. Indemnity. Construction.*

Judge UNDERWOOD delivered the opinion of the court.

October 4.

ON the 19th of October, 1821, David Caldwell conveyed a large tract of land to Joseph Morgan, J. P. Williams, and Robert Boyce, the conveyance to be void on this condition, to wit: "should the said Caldwell well and truly pay all such sum or sums for which the said Morgan, Williams, and Boyce, or either of them have bound themselves,

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or may bind themselves as security for said Caldwell, and release and free the said Morgan, Williams, and Boyce from the whole of the debts or demands they or either of them have or may bind themselves as aforesaid, and in all respects keep the said Morgan, Williams, and Boyce, and each of them, entirely free and indemnified from all manner of damage or loss, by means of their becoming security as aforesaid, then this conveyance shall be void, &c." The preamble to the conveyance recites various obligations in which the grantees were already bound as sureties for the grantor, and then adds a clause showing that Caldwell had requested the grantees to become his sureties "generally, in all such *replevin* bond and *injunction* bonds as he, said Caldwell, may have occasion or deem it proper to give."

On the 27th March, 1823, D. Caldwell executed a deed purporting to convey to John Hughes 503 acres of the land previously conveyed to Morgan, Williams, and Boyce. The consideration of this deed is \$6,539. On the same day, G. Caldwell and B. H. Perkins released to said Hughes all their claim to said land.

On the 17th December, 1825, D. Caldwell, Geo. Caldwell, and Benj. H. Perkins executed jointly, a deed to Saml. K. Nelson, for the consideration of \$12,000, purporting to convey about 900 acres of the land previously conveyed to Morgan &c.

On the 21st of September, 1824, Boyce replevied a debt by becoming surety for D. and G. Caldwell, amounting to \$751 27, that sum being the aggregate of the bond. This debt Boyce paid on the 25th of September, 1826, then, including interest, amounting to \$841 40. To subject the land conveyed to Morgan &c. to the payment of this sum, the Caldwells having become insolvent, Boyce filed his bill.

On the 21st of May, 1823, J. P. Williams and G. A. Tomlinson, as sureties for G. and D. Caldwell, united in the execution of a *supersedeas* bond to Sarah Harlan. Williams, on the 15th of April, 1828, upon his responsibility thus incurred, paid \$1,495 71½. To obtain indemnity and to subject the land con-

vayed to Morgan, &c. he made his answer to Boyce's bill operate as a bill against the Caldwell's &c.

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On the 15th November, 1821, D. Caldwell executed a mortgage to George Caldwell and Benj. H. Perkins, in which he conveys or attempts to do so, 1200 acres of land, on which he then resided, to secure them against loss for having become his sureties for upwards of \$15,000 "in bank and otherwise."

In July, 1822, D. Caldwell's equity of redemption in the land embraced by the mortgage last aforesaid, was sold by B. Prather, a deputy sheriff, in virtue of sundry executions, and purchased by Benj. H. Perkins at the bid of \$2,500.

On the 15th April, 1826, Prather executed a deed to Perkins.

The circuit court decreed the satisfaction of the demands set up by Boyce and Williams, out of the mortgaged estate, in case the money was not paid by a given day, and in case George Caldwell did not remove the incumbrance upon the estate sold and conveyed to Nelson by a day fixed, then the heir of Nelson was to be indemnified by a sale of the estate mortgaged to his ancestor by said Caldwell.

Stipulation  
inconveyance  
to indemnify  
against re-  
sponsibility  
afterwards to  
be incurred,  
valid, and  
creates lien  
on property  
conveyed.

It is here contended that the decree is altogether erroneous, because the debts which Boyce and Williams have paid are not embraced by the mortgage in their favor. We are of opinion that the mortgage does embrace them. The liability of Boyce grew out of the execution of a replevin bond, a class of instruments expressly provided for by the mortgage. In regard to the demand set up by Boyce, we perceive no ground on which a plausible doubt can rest.

The bond executed by Williams was neither a replevin, nor an injunction bond technically speaking; and if the mortgage does not embrace any bond, unless it be of one or the other of these classes, executed after the date of the mortgage, then it may be admitted that the *superedeas* bond executed by Williams is not embraced, and consequently no lien attached to the land to indemnify Williams. We

Though the particular species of bond in which security is entered be not enumerated in recital, yet the intention of the parties being



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to indemnify  
against all  
suretyships  
which mort-  
gagees might  
enter into for  
mortgagor,  
the court con-  
strues the  
the mortgage  
to extend to  
each bond.

provisions of the mortgage against what seems to have been the clear intention of the parties. The title of the estate was vested by the mortgage in Morgan, Boyce, and Williams. They were to hold it until released from all liability on account of suretyships then contracted, or which might thereafter be contracted. This is the obvious meaning and indeed the letter of the defeasance which the mortgage contains; and therefore we shall not burden Williams with the loss, because of the omission to insert *superedeas bonds* in that part of the conveyance which recites that Caldwell had requested the mortgagees "to become his sureties generally in all such *replevin* and *injunction* bonds as he may have occasion to give."

It is next contended that the execution of the subsequent mortgage in November 1821, to Geo. Caldwell and B. H. Perkins, and the levy and sale of D. Caldwell's equity of redemption in July, 1822, and the purchase thereof by Perkins, are sufficient grounds to defeat the demands of Boyce and Williams, growing out of subsequent transactions.

So far as notice results from recording deeds, the statutes regard the transfer of the legal title only. A prior mortgagee is not bound to know the subsequent transactions between his mortgagor and third persons; advances made or liabilities incurred on the faith of his mortgage, cannot be superseded by subsequent mortgage upon construc-

We admit that a prior mortgagee, after notice of the execution of a subsequent mortgage, cannot place additional incumbrances upon the estate by new advances to the mortgagor, or by any new transaction with the mortgagor, and thereby prejudice the subsequent mortgagee. Where the equity of redemption is sold, and purchased, *bona fide*, we likewise concede that the mortgagee with notice could not place new incumbrances upon the estate to the prejudice of the purchaser. But we think Perkins does not occupy either the situation of a subsequent mortgagee or purchaser in reference to the claims of Boyce and Williams, so as to effect their rights. Admitting that he is a subsequent mortgagee in good faith, there is no evidence that Boyce and Williams, or either of them, ever had notice of the mortgage to him, unless the recording of the subsequent mortgage be notice. Our statutes, regulating conveyances, and directing the mode of recording deeds, and prescribing the effect of their registration, seem to have an eye to creditors and subsequent purchasers. There is no act of the gen-

eral assembly which we have met with, that gives a lien in behalf of a subsequent mortgagee for the amount of his debt, to the exclusion of an advance made at a later period than the execution of the subsequent mortgage, by the prior mortgagee, merely because the subsequent mortgage has been recorded in due time. In other words, there is no act of assembly which requires a prior mortgagee, who has received the legal title, to take notice of transactions which the mortgagor and third persons may place upon the records of the county. If such a thing were required by law, it would be necessary for a mortgagee who took a mortgage similar to that taken by Boyce and Williams, to indemnify against liabilities to be contracted at a future day, to examine the clerk's office the moment before incurring them. Even that precaution might not enable a prior mortgagee to act with safety; for at that time there may be an existing mortgage which will be brought forward for record within sixty days, and thus the notice would relate to the day of its execution, and overreach the new equity between the prior mortgagee and mortgagor. Such a doctrine cannot prevail. A *puisne* mortgagee, who gets the legal title from the first mortgagee, may avail himself of its advantage, and thus protect himself against an intermediate mortgagee—*Bank of Kentucky vs. Vance's Administrators*, IV Litt. 173. Much more should the first mortgagee, who makes an advance upon the faith of the legal title, already in him, and without knowledge at the time of any attempt, on the part of the mortgagor, to incumber the estate by creating liens in favor of others, be preferred. Our laws regulating conveyances regard the transfer of the legal title only so far as notice results from the act of registering or recording the deed. Such is the necessary inference from the above cited case, in which Vance relied upon a junior mortgage, and the legal effects resulting from having had it recorded in due time.

The subsequent mortgage to Perkins, unless there had been proof of actual notice to Boyce and Williams, cannot operate against the decree. If the record had furnished such proof, it would then have

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tive notice,  
resulting from  
mere registra-  
tion. there  
must be actual  
notice prior  
to such advance  
or responsibility.

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HEIRS  
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BOYCE & C.

been necessary to consider the circumstance, that Perkins has not shewn a payment of any debt for D. Caldwell, beyond the amount of money, which, it may fairly be inferred from the testimony in the cause, he was reimbursed out of the funds arising from the sale of the land to Hughes and Nelson. Perkins has failed to shew the continuance and existence at this time of any liability for D. Caldwell.

Sale of equity of redemption by sheriff, does not affect prior mortgagor without actual notice of sale.

The sale made by Prather of D. Caldwell's equity of redemption, and its purchase by Perkins, cannot affect the claims of Boyce and Williams: first, because, from the evidence, Perkins made the purchase for Caldwell's benefit, and has been repaid any advances he may have made; and, secondly, because there is no proof that Boyce and Williams were notified of the sale of the equity of redemption, before they became bound for the debts for which they are seeking reimbursement.

None but party injured can complain.

The only remaining objection, which we shall notice, against the decree, is, that the 503 acres of land conveyed to Hughes, in 1823, should have borne a proportion of the sums decreed in favor of Boyce and Williams. If the decree, in this respect, could be reversed by Boyce and Williams, yet, if the other parties have not been injured, Boyce and Williams not complaining, the decree must be affirmed.

If residue of mortgaged premises will satisfy mortgage, chancellor will protect intermediate purchaser of part of the land, when sale is decreed.

If D. Caldwell had retained the land which he sold to Nelson, the chancellor, in foreclosing the mortgage after the sale to Hughes, would certainly have violated the most obvious equity if he had not protected the purchase made by Hughes, provided the residue of the land was sufficient to discharge the mortgage. The mortgagees could require nothing but indemnity, and if that could be obtained without interfering with third persons, it ought to be done. Now it is clear from Nelson's answer, that he had notice of Hughes' purchase. The record of the mortgage to Boyce and Williams was a notice of its existence, and with a knowledge of these facts, Nelson steps into the shoes of D. Caldwell by purchasing the residue of the land. He ought not thereby to make Hughes' condition worse than it would have been if he had not purchased, and therefore we think he has no right to

complain. He took the precaution to guard against danger by taking a mortgage on the property of George Caldwell, for whom Boyce and Williams were sureties as well as for Davis Caldwell. We shall, therefore, leave Nelson's heir to look to George Caldwell, whose property, going to indemnify him, will leave a fund to exonerate the sureties, and thus effectuate justice all around.

The decree must be affirmed, with costs.

*Crittenden and Owsley*, for appellants.

### Trundle vs. Arnold.

ASSUMPSIT.

Appeal from the Boone Circuit; BROWN, Judge.

Case 134.

#### *Misjoinder of causes of action.*

Chief Justice ROBERTSON delivered the Opinion of the Court. October 5.

THIS appeal is prosecuted to reverse a judgment for damages obtained by the appellee against the appellant. The pleadings present the only points which we shall now consider.

The declaration contains eight counts:—

1st. For *tort*, in a fraudulent representation by the appellant, that he had authority to sell some cord wood, cut and lying on land, which, as agent for one Brown, (the owner) he sold to the appellee.

2nd, 3rd, 4th and 5th. *Assumpsit*, charging that the appellant promised to secure to the appellee, the cord wood. The form and substance of these counts prove, that they are in *assumpsit*; for though, in some of them, the plaintiff averred that the promise was made fraudulently, it is evident that the breach of promise, and not the alleged fraud, is the *gravamen*; (II Chitty on pleading, 97; Ibid, 271-8-9; I Ibid, 93.)

6th. For fraudulently imposing on the appellee, a written memorial of the contract, essentially variant from the actual agreement. This is *case*.

7th and 8th. *Case* for negligence and fraud by the appellant as the bailee of the appellee. The characteristic difference between *assumpsit* and *case* against a bailee, is, that in the former, a breach of *promise*; in the latter, a breach of *duty*, is set forth, as the sub-

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stantive cause of complaint; and the criteria for testing this distinction in the remedy, are exemplified in *II Chitty on Pleading* from 103 to 126, and from 270 to 279.

The appellant filed a demurrer to the declaration, and also pleaded *non assumpsit* and *not guilty* to all the counts jointly.

The demurrer to the declaration was overruled, except as to the 4th count; and the demurrer to the plea of *non assumpsit* was sustained.

Error to join causes of action, *ex delicto* and *ex contractu*.

As there was a misjoinder of contract and tort in the declaration, the circuit court erred in not sustaining the general demurrer to the whole declaration; and also erred in rendering judgment on a general verdict, when there was no *remittitur*, (*I Chitty*; 207.)

Wherefore, the judgment is reversed, and the cause remanded with instructions to sustain the demurrer to the declaration, and to give the appellee leave, if he desire it, to amend his declaration, so as to make all his counts of the same general character; either *ex contractu* or *ex delicto*.

*Crittenden* and *Denny*, for appellant; *Marshall* and *Julian* for appellee.

CHANCERY.

### Peebles' Heirs vs. Estill et al.

Case 185.

Error to the Fayette Circuit; HICKEY, Judge.

*Practice. Absolute dismissal of bill. Parties. Heirs; Personal representative.*

October 5.

Chief Justice ROBERTSON delivered the Opinion of the Court. THOMAS PEEBLES, having (2nd April, 1816,) conveyed a tract of land to Daniel Bradford, in trust, to indemnify John Brown, as his surety to Robert Rodes and James Estill, for money loaned by them, afterwards (July, 1816,) sold and conveyed the land to John Peebles, by deed of general warranty, the latter undertaking to pay (as a part of the consideration) the debts to Rhodes and Estill. Afterwards J. Peebles conveyed the land to Peter Mason, by deed of general warranty.

Thomas Peebles having died, his heirs (in 1819.) filed a bill in chancery, alleging the foregoing facts, and avering that Bradford had advertised a sale of the land, under the deed of trust; that the loans by Rodes and Estill were usurious; that John Peebles had paid as much of those debts as were legally due, and more; and therefore, praying for an injunction to prevent the sale by Bradford, and for other and general relief. Rodes' executors never answered, and exceptions to an answer filed by Estill were sustained by the circuit court, and an attachment was awarded to coerce a more direct and satisfactory response to the allegations of the bill, as to the usury and payments. But, at a subsequent term, before either Estill or the executors of Rodes, had filed an answer, the circuit court dismissed the bill absolutely. To reverse that decree, this writ of error is prosecuted.

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It is evident that the personal representative of Thomas Peebles, was a necessary party. But, as the subject matter of the bill was proper for the cognisance of the chancellor, he erred in dismissing the bill absolutely, if the heirs have such an interest as to entitle them to be parties at all. We think they have such an interest. They may be liable on the warranty of their ancestor to John Peebles; for the covenant of the latter to pay the debts to Rodes and Estill, could not be pleaded in bar to his right of action on the covenant of warranty which would be broken by a sale of the land, and his consequent eviction under the deed of trust. He might (in the event of such eviction) sue the heirs on the covenant by which they are expressly bound, and would, himself, be liable only to the administrator, for having failed to pay the money to Rodes and Estill. But, however this may be, the heirs might be liable to the remote vendee, Mason, in consequence of the privity of estate; and that liability could not be affected by the *independent personal* covenant of John Peebles. They have a right, therefore, *quia timet*, to ask the interposition of the chancellor for preventing a sale of the land, which would subject them to liability. They would surely have such a right if the land had never been sold, but had descended

If complainant have an interest in the subject matter of his bill through other persons, necessary parties; error to dismiss bill absolutely. Heir liable upon warranty of ancestor, has a right, by bill *quia timet*, to ask the interposition of chancellor, to prevent sale of land, by which his responsibility would be consummated.

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to them; and it seems to us that their liability on their ancestor's warranty, gives them an equal right to ask relief. Therefore, the circuit court erred in dismissing the bill absolutely.

Wherefore, the decree is reversed, and the cause remanded with leave to make the proper parties.

*Morehead and Brown*, for plaintiffs; *Turner*, for defendants.

TROVER AND  
CONVERSION.

### Fightmaster et al. vs. Beasly.

CASE 136.

Error to the Shelby Circuit; TODD, Judge.

*Devise of future increase. How construed. Statute of frauds. Possession. Loan. Liability to execution. Lex loci possessionis.*

October 5. Chief Justice ROBERTSON, delivered the opinion of the Court.

THE plaintiffs prosecute this writ of error, to reverse a verdict and judgment, obtained against them in the circuit court in an action of trover and conversion of a slave (Royal,) whom the defendant had purchased at a sheriff's sale, under a fieri facias against Samuel Rousee, as administrator of William Wooldridge, deceased, and whom the plaintiffs claimed as their property, at the time of the sale.

At the instance of the defendant, (who was also defendant in the circuit court,) the jury was instructed in effect, to find for him, unless they should believe that Royal was born after the date of William Rousee's will, published in Virginia, in 1811, and in which he devised to the wife of William Wooldridge, (who was the mother of the plaintiffs,) a female slave (Hannah) and "her increase" during life, and to the plaintiffs (the grand children of the testator) the residuary interest in the same slave, (Hannah) and her "future increase;" and, after making other specific devisees, gave to Mrs. Wooldridge, Samuel Rousee, and Phoebe Rousee, the residue of his estate. Royal was a child of the slave Hannah, and was born on the testator's farm about eight months prior to the publication of his will, but had never been in his actual possession. This instruc-

tion amounted, virtually, to a direction to find as in case of a nonsuit, and presents the most important and comprehensive of the many points relied on, for a reversal of the judgment.

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It cannot be seriously doubted that, whatever may have been the actual intention of the testator, respecting the disposition of Royal, his will, when subjected to any authorized process of interpretation, vested the entire right to that slave, either in Mrs. Wooldridge for life, and in the residuary devisees after her death, or in the latter persons in the first instance. The devise (to the children) of the "future increase" cannot, of itself, embrace increase which had accrued prior to the date of the will. Royal did not pass by that devise: and the whole tenor of the will is consistent with this conclusion.

Devise of "future increase" does not pass any child born prior to the date of the will.

It is not material to determine whether Royal passed to Mrs. Wooldridge for life, or immediately to herself and the other two residuary devisees absolutely—for, in either event her interest vested by operation of law, in her husband, as he was in the actual possession. The plaintiffs, therefore, derived no right to Royal from the will.

The interest of wife in slave, vests absolutely in husband, possession.

But if, by any allowable deduction from the facts proved on the trial, a cause of action might be sustained by the plaintiffs, the instruction of the court was erroneous, otherwise it was right. We shall therefore briefly examine the facts. They are, so far as a jury might have been permitted to consider them, the following: In 1802, William Rousee (the testator) loaned to William Wooldridge, (shortly after his intermarriage with his daughter) Hannah, the mother of Royal, and at the expiration of four years took her back, and placed another slave in her place—but in 1809, returned Hannah to Wooldridge, who retained the possession ever afterwards (until his death in December, 1815) of Hannah and of Royal, who was born sometime in 1810. Wooldridge removed with his family, from Virginia to Kentucky, in the spring of 1811, and arrived at the place of his destination in May of that year. Mrs. Wooldridge died in 1814. Wooldridge sometime not long prior to his death, stated that Hannah and her children

If by any possible deduction from facts proved on trial, a right of action might be sustained; error to instruct as in case of non-suit, absolutely.



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belonged to his children, in consequence of a gift by their grand father Rousee. After the death of William Wooldridge, S. Rousee as his administrator returned an inventory of his estate, including Royal, and afterwards, a sale bill including the price which Beasly had given. In the fall of the year 1816, Phoebe Rousee took Royal into her possession, as the property of the then infant children of Wooldridge, whom she kept with her, and for whom she acted as voluntary guardian, and she retained the possession of Royal until about two weeks before the sheriff levied the executions on him, as assets in the hands of Wooldridge's administrator, at whose instance the levy was made, whilst Royal was, in consequence of his request to that effect, at his own house on a visit. The defendant bought Royal for an adequate price, at the sheriff's sale, in 1817, and has ever since had him in his possession.

For the statute of frauds, I Dig. 617, to operate to render slave loaned subject to creditor or of bailee, there must be five years continued possession in Kentucky; possession in another state cannot be taken to possession in Kentucky, so as to eke out the limitation.

The defendant's counsel insists that, even if the plaintiffs had any right to Royal, he was subject to execution for Wooldridge's debts, in consequence of the statute of frauds (I Dig. 617.) But we entertain a different opinion, unless Royal should be deemed, to have been in the possession of Wooldridge's administrator, from the death of Wooldridge, until the fall of the year 1816; and whether Royal was, during that time, in the possession of the administrator, or of the plaintiffs, does not appear certainly, and therefore should not have been decided either way by the circuit court, but should have been left to the consideration of the jury. Wherefore, in considering the point as now presented, the statute of frauds does not apply, unless Wooldridge's possession in Virginia, can be connected with his possession in Kentucky, so as to complete five years possession under the loan; for, as Wooldridge had not been five years in Kentucky when he died, and as the circuit court had not the right to decide for the jury, from the facts that the administrator, or any other person held Royal under Wooldridge's title, until the fall of 1816, it is evident that the statute of frauds cannot sustain the instruction, unless it should be applied to a possession out of this state. The language of the statute is sufficiently compre-

hensive to embrace a possession any where. But we will not presume that the legislature intended that the statute of frauds, or any part of it, should operate on any fact, occurring beyond the territorial limits of Kentucky.

The *lex loci possessionis*, like the *lex loci contractus*, should alone determine the legal consequences of possession, under a loan. If the law of Virginia did not subject the lender's right to the satisfaction of the debts of the borrower's creditors, the loan in Virginia, and the possession under it in that state, should not have that effect in Kentucky. We therefore understand the statute of frauds, as operating on the possession in this state only. The law of Virginia cannot operate on the case 1st; because there had not been five years continued possession, under the loan, in that state; and 2nd; because a possession of even five years or more would not, as between the parties to the loan, have affected the right of property, but would have operated only so far as to allow a creditor of the borrower, to levy an execution on the slave, and sell him; but the law of Kentucky must alone determine, what property is subject to execution in this state—and, had there been no law of this state on the subject, the creditors of Wooldridge would not have been permitted to levy their executions on the slave, merely because they might have done so in Virginia. Consequently, as it was not conclusively proved that there had been five years possession by Wooldridge, and by those holding under him in this state, the statute of frauds of Kentucky does not, of itself, sustained the instruction of the circuit court.

But, nevertheless, the instruction may be maintained, unless the possession by the plaintiffs was insufficient without other evidence of title, to sustain their action, or unless the jury would have had a right to infer from the facts, that the plaintiffs had acquired the title by gift or purchase from the devisees.

We are disposed to think that the plaintiffs were not in the actual possession of the slave, when the execution was levied on him; but, if they were, still that alone would not maintain their action, because

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*Lex loci possessionis* determines the consequences of possession under loan, and the law of Kentucky regulates the liability of property to execution.

Possession insufficient to maintain action vs. wrongdoer, but not against one having the color of title.

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the defendant was a bona fide purchaser of Wooldridge's right, as husband, and as residuary devisee, and, should not therefore, be deemed a wrong-doer against whom the fact of possession would alone authorize a recovery of damages, and consequently, some title in the plaintiffs, is indispensable to the maintenance of their action.

Effect of 41st  
s. of an act  
of 1798, II  
Dig. 1158.

There is no pretence for claiming any right of Royal, from William Rousee, to the plaintiffs; unless they could derive title from the will. Nor is there any reason for infering a gift or sale from the residuary devisees prior to the death of William Wooldridge. Indeed, it is quite manifest that the only claim ever asserted by or for the plaintiffs, was that which it was supposed the will of William Rousee gave them: and even if the residuary devisees had, whilst William Wooldridge retained the possession, given Royal to the plaintiffs, no title would have passed, unless there had been record proof of the gift, as required by the 41st section of an act of 1798, (2nd Digest, 1158.) See Pyle vs. Maulding (lately decided.)

Acquiescence  
of parent in  
children's  
claim neither  
concludes  
his creditors,  
nor bars him  
or his admr's  
or execn ors  
from asserting  
right to the  
property.

If, by the will, or otherwise, the absolute right of Royal vested in Mrs. Wooldridge, and consequently passed to her husband by operation of law, there is nothing in the proof that would have authorized the jury to infer a *transfer* of that title to the plaintiffs, so as to affect the defendant. The utmost that could have been inferred from the facts, was an *acquiescence* by William Wooldridge, in his children's claim (as asserted under the will) and by his administrator, some time after his death. But, even that did not divest Wooldridge or his administrator of any legal right which either of them may have had; nor would it have prevented the administrator from successfully asserting that right. So, if the title passed by the will, to William Wooldridge, Samuel Rousee and Phoebe Rousee as residuary devisees, the utmost that the facts would have allowed the jury to infer, was a similar *acquiescence* by Samuel Rousee for himself, and as Wooldridge's administrator; and, which alone, would not have prevented him from resisting the claim of the plaintiffs, or from subjecting the right of Wooldridge and of himself (as he in effect

did) to sale under execution, against him, as administrator, an *effectual sale or gift* by him to the plaintiffs, could not have been inferred from every thing that was proved. And, therefore, if the title passed by the will to the residuary devisees, the plaintiffs failed to shew any cause of action for at least two thirds of Royal. For they not only did not prove any absolute right, but failed to shew any special property, resulting from bailment or otherwise, in those two thirds.

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As to the interest of Phoebe Rousee, (if she had any interest) the facts may possibly have authorised such a deduction as might have vested her right either absolutely or specially in the plaintiffs. But, whether they did or not, we shall not now decide, because, were it conceded, that *quoad hoc*, the plaintiffs had some right, it could not have been more than that of tenants in common with the defendant. And, although it is said in *Wilson and Gibbs vs. Reed* (III Johnson's Reports, 176,) that a tenant in common may maintain trover against his co-tenant for a sale of their chattel, it cannot be doubted that, according to the settled doctrine of the law, the plaintiffs, even if they could have been considered tenants in common with the defendant, could not have maintained trover against him for using the entire slave as his own, and withholding him and all his profits from them. Nothing but an actual or virtual destruction of the property would have sustained trover for the one third of his value.

One tenant in common cannot maintain an action of trover against another for the mere use of the entire chattel, there must be an actual or virtual destruction of the property.

Wherefore, it seems to this court, that the circuit court did not err in giving the instruction which we have been considering.

We are also clearly of the opinion, that the circuit court did not err, in setting aside a verdict rendered on a former trial, in favor of the plaintiffs, in consequence of an erroneous opinion given to the jury by the court, in telling them that the defendant's evidence did not "*conduce*" to sustain his plea of not guilty, when, in our opinion, it tended almost as strongly then, as it does now to defeat the action.

Not error to set aside a verdict predicated on an error of the court.

As the foregoing view of the case would, if applied properly to all the other points presented in

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COLMESNIL.

the record, shew that there is no error, we shall not protract this opinion by a particular consideration of those several points.

Wherefore, as we have not been able, on a thorough examination of all the facts in the record, and a reduction of them to their true and legitimate effect, to detect any error of which the plaintiffs have any just cause to complain, and as we are satisfied that the verdict was such as it ought to have been upon the proof as exhibited, the judgment of the circuit court must be affirmed.

*Monroe*, for plaintiffs; *Richardson*, for defendants.

DEBT.

### Scott & Thatcher vs. Colmesnil.

Case 137.

Error to the Jefferson Circuit; PIRTLE, Judge.

7jm 416  
120 111

*Pleading. Evidence. Verdict. New trial. Partnership. Secret partner.*

October 6.

Chief Justice ROBERTSON delivered the opinion of the Court.

Judge Nicholas did not sit in this case.

THE plaintiffs sued the defendant as surviving partner of William P. Lee, secretly trading (as the declaration avers) in the style of *W. P. Lee*, in buying and selling hogs.

The suit is founded on a note for \$2789 56 signed "*Wm. P. Lee*," dated December 22nd, 1818; made payable to T. Stewart and Arthur L. Campbell, and endorsed by them to the plaintiffs. The note was given in consideration of hogs, which had, some short time prior to the date of the note, been sold to Lee by the plaintiffs.

The defendant filed four pleas:—

1st. *Non est factum*. 2nd. *Nilil debet*. 3rd. The statute of limitations; and 4th, a special plea in bar averring that, prior to the impetration of the writ, the plaintiff had sued Lee alone on the note; obtained a judgment against him, and imprisoned him under a *ca. sa.* issued on the judgment.

Demurrers to the 2nd, 3rd, and 4th pleas were sustained by the court. And a jury, sworn to try the issue of fact concluded on the 1st plea, having

found a verdict for the defendant, the court overruled a motion for a new trial, and rendered a judgment according to the verdict. To reverse that judgment, this writ of error is prosecuted.

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THATCHER  
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COLMESBURY.

The plaintiffs insisted that the circuit court erred in overruling their motion for a new trial. 1st, because, (as they allege) it erred in admitting evidence objected to by them; and 2nd, because the verdict was not authorized by the proof.

The defendant, denying that there was any error, to the prejudice of the plaintiffs, says that the court erred in sustaining the demurrers to his 2nd, 3rd, and 4th pleas; and that, therefore, the judgment is right, even if the evidence did not justify the verdict, or if the court erred in admitting irrelevant testimony.

Before we consider the errors assigned by the plaintiffs, we will, therefore, dispose of the question now raised on the pleas.

To debt on specialty neither statute of limitations nor *nihil debet* a good plea.

Neither of the pleas we are now considering, denied the alleged partnership, or the consideration as charged, or the original liability of the defendant, upon the note. Wherefore, as the note, though not sealed, had all the effect of a specialty, it is evident that neither *nihil debet* nor the statute of limitations, was an available defence to the action. The 4th plea is also, we think, insufficient, though not so obviously so as either of the other two.

The imprisonment of Lee, which seems to have been intended as the *gravamen*, could not, of itself, and alone, bar the action. The mere caption and imprisonment of Lee did not satisfy or release the judgment, and could not, therefore, have operated either as an actual or legal exoneration of himself, or of his co-obligor. Nothing but actual satisfaction, or a liberation of Lee by the plaintiffs, or a release to him in fact, or in law, could have exonerated the defendant from any joint liability which pre-existed. (Cro. El. 573. 5th Co. 86. Gow, on Par. 257, Mar. pa.) If Lee had escaped, or had been discharged, the defendant's liability would not have been thereby destroyed, or impaired. (Cro. El. 479, 555, 573, 5th Co. supra.)

Imprisonment of one obligor does not operate as exoneration of himself or co-obligor without actual satisfaction and release.

SCOTT &  
THATCHER  
vs.  
COLMESNIL.

Obligation of  
partners, at  
law, joint; in  
equity joint  
and several.

But, the plea may, nevertheless, be good, if the judgment against Lee, merged the whole obligation. The judgment on the demurrer, therefore, presents another matter for consideration.

If the defendant were liable as a dormant partner, and the note be binding upon him, the obligation was joint. Although partners are considered, in equity, as jointly and severally bound, yet their legal liability is purely and clearly joint, and not several. *Gow*, 201, M. P.; 210, *Ibid*; 259, *Ibid*. The reason of this distinction between the character of partnership obligations, in equity and at law, is that the *lex mercatoria*, which considers such liabilities as joint and several, has been adopted in equity without limitation, but has not been permitted in a court of law to overrule or change the common law rule, founded on the formal character of partnership obligations. It seems to be undeniably established, that, in a suit *ex contractu*, a partner may plead in abatement the non-joinder of his co-partners. This he could not do, were the obligation several as well as joint, in a court of law.

Judgment vs.  
one partner,  
merges the  
pre-existing  
joint liability  
of all the part  
ners. Merger  
of the con-  
tract as to  
one jointly  
bound op-  
erates as a mer-  
ger as to all  
jointly liable.

It must be admitted to be consistent with principle and analogy, that a judgment against one in a suit on a joint contract, will merge the whole pre-existing joint liability. For surely, the individual liability of the party (defendant) to the judgment, must necessarily have been merged in the judgment, "*transit in rem judicatum*." And it is undoubtedly a general rule, subject to but few, if any exceptions, that whatever extinguishes or merges the legal and binding liability of one joint contractor, extinguishes or merges the like liability of all who were jointly bound with him in the contract. If a judgment be obtained against one obligor in a suit on a joint contract, can another suit be maintained against him on the same contract? Can a suit be maintained against his co-obligors? May they not plead the non-joinder of the omitted obligor in abatement? If they be all sued together, may not the merger of the obligation by the former judgment against one of them, entitle them to a non-suit? See *Cro. J.* 73; and *1 Saunders' Reps.* 153; *N. I.* 291, f. g.

Though it has been frequently said by judges and lawyers, that the supreme court of the United States, in the case of *Sheeley vs. Mandeville*, VI Cranch, 253, declared that a judgment against one joint obligor, does not so merge or change the character of the contract as to bar a suit upon the same contract against his co-obligor, yet, a careful examination of the opinion in that case, will, we think, shew that no such doctrine was therein *settled*, and no such point *decided*. Judgment having been rendered against R. B. Jameson on a note signed "*R. B. Jameson*," another suit was afterwards brought on the same note against Mandeville, as a dormant partner, trading in the style of "*R. B. Jameson*," Mandeville pleaded the judgment against Jameson in bar of the action against himself; and concerning that plea the supreme court said: "Were it admitted that this judgment bars an action against R. B. Jameson, the enquiry still remains, if Mandeville was originally bound, if a suit could be originally maintained against him, is the note *as to him merged* in the judgment?" "The doctrine of merger (even admitting that a judgment against one of several joint obligors would terminate the whole obligation, so that a distinct action could not afterwards be maintained against the others, *which is not admitted*) can be applied only to a case in which the original declaration was on a joint covenant, *not to a case in which the declaration in the first suit was on a sole contract*." "And it appears to the court, that this claim is not barred by any technical rule of law, *since the proceedings in the first action were instituted upon the assumpsit of Jameson individually*."

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THATCHER  
VS.  
COLMESNIL.

Now it will be at once perceived, that though the court may have *intimated an impression*, it gave no *judicial opinion* on the point we are now considering. That point was not considered by the court as necessarily involved in that case.

But not only principle and analogy but a formidable array of authorities may be opposed to the *obiturn* intimation in the case of *Sheeley vs. Mandeville*. See I Chitty 30; Com. Dig. K. 4; 11 Strange, 820; Robertson vs. Smith, XVIII Jonuson, 459; Penny vs. Mar-



SOTT &  
THATCHER  
vs.  
COLMESNIL.

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tin, IV Johnson's Chy. Rep. 566; Willings et al. vs. Consequa, I Peters; C. C. Reps. 301.

In the case of Sheeley vs. Mandeville, counsel admitted, and the court seemed virtually to concede, that a judgment against one obligor, on the joint contract, would bar another action against him on the same contract, because, as to him at least, the contract had merged in the judgment. What contract merged? The contract as it was—the contract as sued on—the joint contract. Could it be changed from joint to several by the judgment? Would not a destruction or suspension of the cause of action as to one joint obligor, by the voluntary act of the obligee, destroy or suspend the whole cause of action as to all the joint obligors?

We would be inclined to think that, according to the strict rules and analogies of the common law, a judgment against any one obligor on a joint contract, would bar any other suit on *that contract*.

But whether this technical rule is *impugnably* entrenched behind principle and authority, or whether the less analogical but more liberal doctrine of the mercantile law, adopted in equity, might yet be adopted by this court, we are not required in this case to decide finally and conclusively.

Judgment vs. one, upon a contract, upon its face, his sole individual contract, and as such sued upon, no bar to subsequent action upon it in its true character of a joint contract.

The plea does not shew that Lee was sued on a joint contract; and we are bound to presume that, in the suit and judgment against him, the contract was treated and considered as his own individual obligation. As in the case of Sheeley vs. Mandeville, his name alone appeared on the note—the undertaking to pay was in the singular number ("I")—it would seem that Colmesnil, if a partner at all, was not then known to have been such. In such a case, (of dormant partnership) when the contract seemed on its face to be sole, and in that character had been prosecuted to judgment against the only apparent obligor, a subsequent suit upon it in its true character as a joint contract would not be barred by the prior judgment upon a contract considered, described and appearing as essentially distinct and different. And in this view we are sustained by the direct and positive decision of the supreme court in the case of of Sheeley vs. Mandeville.

The legal effect of the judgment cannot be more extensive than the contract as declared on, and as it was believed to be. If the latter be described, and be understood to be sole, the former cannot be joint. The sole contract, as described and as considered, was merged; but a joint contract not exhibited—not adjudicated on—not known to exist—was not embraced or affected by such a judgment.

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THATCHER  
VS.  
COLMESNIT.

“Even those acts done by a creditor, such as selecting one partner, accepting new bills &c. which are usually held to operate the discharge of the other partners, will not liberate an unknown dormant partner, if they were done by the creditor during the time of his concealment.” Gow, 194.

We need not decide whether an action on a contract, known by the creditor to be joint when he obtained a judgment on it as a sole contract, would be barred as to all or any of the obligors by judgment on a declaration describing the obligation as sole. For in this case it does not appear that the plaintiffs, when they obtained their judgment against Lee, knew that the defendant was liable on the note; and it even yet remains to be decided whether or not he shall be deemed a party to it.

Quere—whether judgment on a contract described to be sole, when it was known to plaintiff to be joint, would bar future action against others jointly liable?

Wherefore, we conclude that the 4th plea was insufficient.

We will now, therefore, proceed to consider the grounds for a new trial.

We have not been able to perceive any relevancy in the bill of exchange and bill of sale, which the circuit court, notwithstanding the objection of the plaintiffs, permitted the defendant to read to the jury. They could have had no possible application, unless, in some degree, they tended to impeach the credibility of Churchill, who had been examined as a witness for the plaintiffs.

Error to admit evidence which has no bearing on or relevancy to the matter in contest.

Churchill, after stating that the defendant virtually admitted, in a conversation with him some years after the date of the note sued on, that he was a partner with Lee in the purchase of the hogs for which the note was given, swore that the defendant

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THATCHER  
vs.  
COLMESNIL.

also told him that he had, by a timely sale of his interest to Lee, extricated himself from a perilous speculation—that he made about \$600 by his sale to Lee, but that, having sued him at New Orleans for the \$600, he (Lee) gave him a bill of sale for two slaves, which, as was afterwards ascertained, did not belong to him.

The bill of exchange was for \$2050, drawn in favor of "*Honore and Colmesnil*," March the 18th, 1819. The bill of sale was for two slaves transferred to "*J. A. Honore and Colmesnil*," May the 21st, 1819, for \$1400. The bill of exchange had been protested on the 20th of May, 1819, for non-payment. The purpose for which these documents were used as evidence was, we presume, to show that Churchhill was mistaken when he swore that Colmesnil had told him that he had sued Lee for about \$600, and had obtained a bill of sale for two slaves therefor, and, by thus discrediting his memory, impair the force of his testimony, as to the conversation concerning the partnership.

But how such documents could, in any degree, tend legitimately to authorize such a deduction, we are at a loss to understand. There is nothing to identify or connect the transaction alluded to by Churchhill with the bill of exchange, or with the bill of sale; and even if any connection could be reasonably inferred, (which is not admitted,) the bill of sale is no proof against the plaintiffs, (who were strangers to it,) that the true consideration was \$1400, or that the \$600 formed no part of it. But could they have all the effect claimed for them in these particulars by the defendant, surely they could not be admitted as legal or pertinent evidence to prove that the defendant *did not tell Churchhill what he swore that he had said to him*, or that Colmesnil had not sued Lee for about \$600.

We are, therefore, of opinion that the circuit court erred in admitting the documents.

Dormant partner at date of note given by public partner, bound. One

Whether the facts, as presented to the jury, would be sufficient to sustain the verdict, would, if it were proper now to respond to it, be a more important question.

If, at the date of the note, the defendant was a dormant partner, the note may be obligatory on him. One partner may bind his co-partner by contract without a seal, even though the written evidence of the contract be entitled, in consequence of the statute of this state of 1812, to the effect of a sealed instrument.

If, when the hogs were bought and the note was given, the defendant was, by contract with Lee, to be a participant in the profits of the purchase, he should, *inter alios*, be deemed a partner.

If he had been a dormant partner when the hogs were bought, and had ceased to be a partner prior to the date of the note, he would be liable only on the original assumpsit, and would not be suable on the note, for a secret partner (not being trusted) is not bound to give notice of dissolution; and an authority already quoted shows that the note could not (were he an unknown partner) extinguish his pre-existing parol liability.

But if the defendant was not only a partner, but was an ostensible one, and known as such by the plaintiffs, the note should, *prima facie*, be deemed the individual obligation of Lee, given in satisfaction of the partnership debt, unless there had been positive proof that the conventional or practical style of the firm was "W. P. Lee."

But no such deduction would be allowable unless the defendant was, at the date of the note, known to be a partner.

The foregoing are the principal criteria for testing the plea of *non est factum*. But as the judgment must be reversed for error in admitting impertinent testimony, and there may be a new trial on the merits, we would deem it premature and extra-judicial, to intimate now how far the facts before the jury did or did not authorize the verdict and judgment according to the principles herein suggested.

These principles have been laid down to aid the circuit court and the parties in making such a disposition of this controversy as may be just, satisfactory, and final.

SCOTT &  
HARTCHER  
VS  
COLMERNII.

Partner can  
bind another  
by note not  
under seal,  
notwithstand-  
ing the act of  
1812.

He who is to  
participate in  
the profits of  
purchase, a  
partner.

(Dormant  
partner not  
bound to give  
notice of dis-  
solution.) If  
dissolution  
prior to date  
of note evi-  
dencing debt  
of partner-  
ship, he is  
bound by the  
original as-  
sumpsit. If  
partner osten-  
sible unless  
note given in  
the style of  
the firm to be  
considered  
the individual  
note of him  
who executed  
it.

WELSH  
v.  
EAKLE.

Judgment reversed, and cause remanded for a new trial.

*Richardson and Haggin, for plaintiffs; Denny and Duncan, for defendant.*

SLANDER.

## Welsh vs. Eakle.

Case 138.

Error to the Cumberland Circuit; MONROE Judge.

*Words. Slander. Construction. Jury.*

October 6.

Chief Justice ROBERTSON delivered the Opinion of the Court.

When words spoken are susceptible of two meanings, the one slanderous the other not, the jury to determine in what sense used.

THE plaintiff sued the defendant for slander—and set forth the words published in the following manner: “You (meaning plaintiff) stole my (meaning defendant) corn out of the field (meaning out of the defendant’s field, where he had a pile of corn gathered.”)

Upon the trial of the general issue, after the plaintiff had proved the publication of the words as charged, and also proved that the defendant had, at the time of uttering the words, and prior thereto, corn lying in a pile in his field, the court instructed the jury to find, as in case of a nonsuit; and verdict and judgment were rendered accordingly against the plaintiff, of which he now complains.

As the words were susceptible of a two-fold meaning, one imputing a felony, and the other amounting to a trespass only, it was the province of the jury to determine, from the circumstances, in what sense they were uttered and understood. This is the rational and legal rule as now well established by authority. See Starkie on Slander, 44 to 55, and the authorities there cited.

Wherefore, the instruction was improper; and for that cause the judgment is reversed, and the cause remanded for a new trial.

*Walker, for defendant.*

## French vs. Frazier's Administrator.

ASSUMPSIT.

Error to the Shelby Circuit; Todd, Judge.

Case 139.

*Pleading. Pleas. Scire facias. Administrator. Practice. Evidence.*7jm426  
1137 175

October 6.

Judge UNDERWOOD delivered the opinion of the Court.

FRAZIER, in his life time, instituted an action of assumpsit against French for money had and received. Subsequently, the declaration was amended by filing two special counts. The first alleges, in substance, that French promised in consideration that Frazier would place in his hands divers notes and accounts, which he held on various persons, payable in notes on the Bank of the Commonwealth, that he, French, would collect the same and pay over the amount when collected. The count then avers, that the plaintiff did place his notes and accounts in the defendant's hands, and that the defendant collected \$300, in notes on the Bank of the Commonwealth, worth \$300 in specie; yet the defendant had failed to pay over either the Commonwealth's Bank notes, when collected, or their value. The second special count, in substance, avers that the defendant agreed with the plaintiff that if he would place in defendant's hands divers notes and accounts due by divers individuals, and payable to plaintiff in notes of the Bank of the Commonwealth, that he, the defendant, would collect them, and after paying himself the amount of \$ , which the defendant had paid, or was bound to pay, as the surety of the plaintiff, that he, the defendant, would then pay over to the plaintiff whatever amount should remain in his hands after paying the suretyship as aforesaid. The count concludes by averring that, in consideration of the defendant's said undertaking, the plaintiff placed in the defendant's hands for collection, as aforesaid, divers notes and accounts, on divers individuals, amounting to \$ , which notes and accounts, or some of them, were by said individuals paid over to the defendant in notes on the Bank of the Commonwealth, and received by said defendant to a large amount, viz: \$ ; and the plaintiff avers that said \$ , in notes, were worth \$ in specie, and the plaintiff further avers, that the

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FRAZIER'S  
ADM R.

debt for which the defendant was bound, as surety, as aforesaid, was by the plaintiff paid off and discharged on the day of      , without the appropriation of said notes and accounts so collected by the defendant ; yet the defendant hath not paid to the plaintiff said bank notes or their value &c.

At the June term, 1829, the defendant filed the plea of non assumpsit, and the plaintiff his rejoinder ; and it was agreed on the record, that any thing might be given in evidence upon the trial of this issue that would be admissible under any legal plea.

At the February term, 1830, the death of the plaintiff was suggested, and an order made reviving the suit in the name of George Bayne, senior, as the administrator.

At the June term, 1830, the record states that 'the parties came &c. and, on motion of George Bayne, administrator &c.' a *scire facias* is awarded him to renew this suit in his name, as administrator &c." A *scire facias* issued, bearing date the 20th Aug. 1830, returnable to the next September term, and was executed on the 28th of August, 1830.

At the September term, it seems that the cause was continued. At the March term, 1831, the defendant moved to quash the *scire facias*. The court overruled the motion. Thereupon, the defendant offered to file three pleas, which, being objected to by the plaintiff, the court rejected the first and second pleas and would not suffer them to be filed ; but permitted the third plea to be filed. The first plea was, in substance, that Bayne was not the administrator of Frazier. The second plea was, in substance, that Frazier had not departed this life. The third plea was *nul tiel record*. There is a fourth plea spoken of as having been filed at the March term, 1831, but no such plea is copied in the record before us, and we know not its contents.

A trial took place, which resulted in a verdict and judgment for \$70 in favor of Bayne ; to reverse which, the writ of error is prosecuted. Seventeen errors are assigned, and the record contains ten bills of exception. We deem it unnecessary to enter into a minute investigation of each assignment of error, or to notice every thing which took place in the cir-

cuit court which cannot be sustained. We shall briefly point out some errors for which the judgment must be reversed, and lay down the principles which, on another trial, will probably dispose of the cause without difficulty.

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FRAZIER'S  
ADM'R.

We think the *scire facias* sufficient, and that the court did not err in refusing to quash it. We are also of opinion, that the judgment of the court upon the plea of *nil tiel record* was correct.

The court erred in rejecting the pleas Nos. 1 and 2 offered by the defendant. He was required by the *scire facias* to appear to shew cause, if any could be shewn, why Bayne, as administrator, should not sustain the action against him. If Bayne was not administrator, as alleged in plea No. 1, that was a complete bar to his prosecuting a suit in his name which had been instituted by Frazier. If Frazier was still alive, as averred in plea No. 2, he could have no administrator, and a grant of letters of administration would, in that event, be void. Nor would French be estopped, by the record of the county court granting the letters of administration, to deny the death of Frazier. As we perceive no objection to the form of these pleas, and as they constituted, if true, legal causes why Bayne, as administrator, should not proceed with the suit instituted by Frazier, they ought not to have been rejected. They were not pleas in abatement; hence there was no reason for rejecting them because they were not verified by oath.

Plea to *scire facias* to revive in the name of plaintiff, an adm'r, that he was not adm'r, good bar. Then, to same, that original plaintiff was not dead, good. Defendant not estopped by administration granted by county court, nor by order of review in circuit court. Judgment on *scire facias* to be for or against administrator.

The court may have acted upon the opinion, that the order of February, 1830, reviving the suit in the name of Bayne, as administrator, was conclusive upon French, and that he could not deny Bayne's character, as administrator, in pleading to the *scire facias*. Such a view of the case cannot be sustained, because, for any thing appearing to the contrary, the order of February, 1830, was *ex parte*. It does not appear that French assented to it. If it was obligatory, there was no necessity for a *scire facias* to revive.

Frazier having died before interlocutory or final judgment, according to the suggestion made on rec-



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vs.  
FRAZIER'S  
ADMINISTRATOR

ord, his administrator was entitled to a *scire facias* against the defendant in the action, as provided for in the 5th section of an act passed in 1801. See II Litt. Laws, 441. The object of the *scire facias*, as the section shews, is to summon the defendant to shew cause why the action should not be sustained in the name of the administrator. The rules and regulations governing such a *scire facias* are the same as those applicable to the case of a *scire facias* after an interlocutory judgment. The rules and regulations thus referred to and adopted, may be seen in Tidd's Practice, 1168, 69 and 70, from which it will appear that the judgment ultimately to be rendered, must be for or against the administrator, and hence whatever will shew that there is no administrator, or that he ought not to recover, is a good defence to the *scire facias*.

The new parties introduced *scire facias* yet it is but one suit and one trial should be had. The defendant may make new defence, but he is not precluded from the defence relied on by decedant. Proper to try all the issues at once.

Upon the calling of the cause for trial, the plaintiff below, now defendant in error, moved the court to have the jury sworn to try the issue formed upon the plea of non assumpsit, filed by French in June, 1829, when it may be presumed Frazier was living. To this French objected, but the court overruled his objections, and the jury were accordingly sworn to try that issue. If the plea of *non assumpsit* could be considered as properly remaining in the cause after the death of Frazier, we think the court acted correctly in not suffering a trial upon the *scire facias*, and then another upon the original pleadings. The object of the *scire facias* is to substitute a new plaintiff in the place of him who has died. It properly opens the door to let in any new defence which the defendant can assert against the new plaintiff; but we see no reason why it should deprive the defendant of the defence originally relied on against the action, or why it should become necessary to have two trials instead of one.

Under the statute of 1801, although a new party is introduced, it is but one suit, and there should be but one trial. As, therefore, the defendant, now plaintiff in error, did not ask leave to withdraw his plea of *non assumpsit*, we regard it as properly in the cause, and think the court acted correctly in having the jury sworn to try all the issues at once.

The evidence of Henry Radford, proving that he was in the *habit* of collecting money upon commission, and that he was in the *habit* of charging from 6 to 10 per. cent on the amount collected, ought to have been excluded from the jury. If the question was how much French ought to have been allowed by way of compensation for collecting the notes and accounts put into his hands by Frazier, the inquiry should have been directed to the value of the services rendered by him. We cannot perceive any criterion to reach that value growing out of Radford's *habits*. He may be in the *habit* of charging too much or too little. The question in such cases must be decided by inquiring at what prices or commissions can competent collectors be procured, and not the particular practices of any individual.

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ADM'R

*Quantum meruit* of services, evidence of what A charges not competent; for what qualified persons can be procured to perform them the inquiry.

We think the court correctly refused to instruct the jury to disregard the two special counts of the declaration. After a jury is sworn to try an issue or issues which embrace all the counts of a declaration, if a verdict being found upon any count supposed to be faulty, and a judgment thereon would be preserved under the operation of our statutes of jeofails, we think the jury should not be instructed to disregard such count; because if they were to act upon it and decide in the plaintiff's favour, such decision would be sustained by law. Whenever the foundation is laid upon which an available verdict and judgment can rest, it ought not to be disturbed, when, by doing so, unnecessary costs and trouble, if not injustice, beyond remedy, might be the consequence.

Jury sworn to try an issue or issues embracing entire declaration, not erroneous for court to refuse to instruct the jury to disregard counts that may be faulty, there being such bases laid as will sustain a general verdict and judgment.

The special counts objected to, do not describe the notes and accounts placed in the hands of French with precision. They are spoken of in general terms. It was not essential to be more particular, because it is the Bank notes collected upon them with which the defendant is charged, and for which he is held responsible. The failure to fill up the blanks in the second special count is not a sufficient reason why that count should have been disregarded on motion. The finding of the jury would have rendered the amount certain.

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In the progress of the trial, the defendant French gave in evidence the record of an action instituted by him against Frazier, and a schedule given by Frazier in April, 1827, he having then taken the oath of an insolvent, and surrendered said schedule in order to obtain a discharge from custody. It seems that this schedule was subsequent to the delivery of the notes and accounts by Frazier to French, the money collected on which constitutes the subject of the present controversy. In the schedule no mention is made of the notes and accounts delivered to French, or of any claim against French for the money collected, or to be collected upon them. The plaintiff in the circuit court, moved to exclude all this evidence from the jury. The court overruled the motion, but instructed the jury that the evidence thus given could not, in any way, lessen the damages, or show that the plaintiff had no right to maintain his action. To the instruction so given, French excepted. If the evidence could neither lessen the damages, nor tend to defeat the action, it was irrelevant and ought to have been excluded. But we think it was relevant, and that the court erred in its instructions. The omission to mention the claim or demand asserted in this suit in the schedule, which seems to have set out Frazier's *choses in action* with much particularity, is a circumstance from which the jury might have inferred that the claim or demand now set up, had been settled. It is not conclusive, we admit, but then the jury were the proper judges of its weight, under all the evidence and circumstances connected with the cause.

Irrelevant  
evidence not  
admissible,  
but whatever  
conduces to  
show the  
claim sued on  
had been set-  
tled is rele-  
vant, and  
should go to  
the jury.

In the progress of the trial, the defendant below gave evidence, as the record states, conducing to show that the money which he had collected upon the notes and accounts put into his hands, had been received by him more than five years before the institution of this suit. The plaintiff below proved by two witnesses, that French acknowledged before arbitrators, the collection of a large portion of the notes and accounts placed in his hands by Frazier, and produced an account by way of set-off, which was rejected by the arbitrators. Upon this state of the proof, French moved the court to instruct the

jury "that the plaintiff is barred by the statute of limitations, unless he has proved a cause of action arising within five years before the commencement of this suit, or has proved an express promise to pay the plaintiff his claim, or some part thereof, within five years before the commencement of the action, and that the testimony of Woolfolk and Carpenter, (the two witnesses alluded to) does not take the cause out of the statute of limitations." We think this instruction substantially correct, and ought to have been given. It is supported by the cases of *Bell vs. Rowland's administrators*, Hardin 301, and *Harrison vs. Handlev, I. Bibb*, 444, and a train of subsequent adjudications. No witness proves an express promise to pay, or an express acknowledgement of a subsisting debt as a debt then due, within five years next before the institution of the suit. Woolfolk says that French denied that he was indebted, and Carpenter does not recollect any admission of indebtedness.

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FRAZIER'S  
ADM'R.

There are various questions made relative to the admissibility of testimony relating to records or to facts growing out of records, when the records themselves were not produced. We shall not notice these matters further than to say, that we regard the correct rule to be this: Witnesses cannot speak of the contents of a record, because these are best demonstrated by the exhibition of the record itself; but witnesses may speak of a fact connected with the record, and which exists as a consequence of the record without producing it. To illustrate by example, if A pays B \$100, it may be paid in discharge of a judgment, or it may be paid for the purchase of property. If the first, then the payment is a consequence growing out of the existence of the judgment and is connected with it; if the latter then the payment is wholly unconnected with any record. Now, if it becomes important to enquire why the money was paid, and on what account, it would be competent to prove by a witness that it was paid in discharge of a judgment without producing it, and thus far the witness might speak of the record. It was not proper that the witness, Wright, should prove how an execution was endorsed, because that

To escape the statute of limitations, there must be proof of a promise to pay or of an express acknowledgement of a valid subsisting debt within five years.

Parol testimony not competent to prove the contents of a record, but may prove facts connected with and resulting from or incident to a record.

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could have been proven with absolute certainty by the production of the record, the better evidence; but we see no reason why he should have been prevented from proving that notes on the Bank of the Commonwealth had been received in discharge of an execution against Brown, and paid over to French. These were facts growing out of the record, but not necessarily to be verified by it; for if the execution had not been endorsed, that Bank notes might be received in discharge of it, still the officer may have taken them in satisfaction, and the execution plaintiff may thereafter have accepted them from the officer. We think it would have been competent to show these facts by a witness, if the record had been produced, and there had been no endorsement on the execution, and hence the facts can be proved without the record. Attention to the rule prescribed will enable the court, on another trial, to settle all the points under this head, without difficulty.

Administration granted *prima facie* evidence of intestate's death; it questioned, *onus* upon assailant.

We regard the grant of letters of administration by the county court, as *prima facie* evidence of the death of the party, and that an administrator has been legally appointed. If the act of the county court is impeached, the burden of proof lies on the assailant to show its invalidity.

The judgment of the circuit court is reversed and set aside, and the cause remanded for a new trial.

The plaintiff in error must recover his costs.

*Monroe*, for plaintiff; *Richardson*, for defendant.

CHANCERY.

Triplett et al. vs. Gill et al.

Case 140.

Error to the Montgomery Circuit; ROBBINS Judge.

*Bond conditioned to convey land by deed with general warranty. Covenant in deed that grantor has title. Mistake. Onus probandi.*

October 9.

Chief Justice R. BERTSON delivered the opinion of the Court.

In 1823, Frederick W. S. Grayson had a suit in chancery pending in the Bath circuit court, in his own name as complainant against the

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unknown heirs of Andrew Hare deceased, for a decree for a conveyance of a tract of land in said county, which had been granted to the said Hare, and to which Grayson claimed the equitable right. Whilst the suit was pending, to wit: on the 18th of August, 1823, Thomas Triplett, who seems to have been associated in some way, with Grayson in interest, sold the land to Samuel C. Gill and John Picklehimer, who were then living on it, and claiming ~~it~~ or a portion of it, under an adversary title. Triplett covenanted to convey the legal title to his vendees by deed of general warranty, within a year from the date of the contract, and as soon as a title should be vested in Grayson, by a decree to be rendered in the aforesaid suit in chancery.

Afterwards, to wit: in May 1824, (a decree having in the mean time been obtained by Grayson, and a deed conformably thereto, having been made to him for the said land by a commissioner) a conveyance was executed and delivered to Gill and Picklehimer, by Grayson, with a joint and several covenant by said Triplett, as well as himself, in the following words, "*that the said Grayson has good right and lawful authority, to sell and convey the premises herein specified, and the title to the same, they do hereby forever warrant and defend against the claim of all and every person, or persons whatsoever.*" And thereupon, Gill and Picklehimer made an endorsement on Triplett's bond for a title, in which they acknowledged the receipt of a conveyance, according to the tenor of the bond.

In 1829, during the pendency of a suit at law, instituted by Gill and Picklehimer against Triplett for damages, for a breach of so much of the joint and several covenant in the deed as stipulated, that Grayson had good right and authority to sell and convey, Triplett and Grayson's administrator filed their bill in chancery against Gill and Picklehimer, and against certain persons as the heirs of John Hare and others, as his unknown heirs. They alleged in the bill, that the covenant as to the authority to sell and convey, was inserted in the deed through mistake, that the deed was intended and understood by all parties, to be a deed of general warranty of title

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only, and that, if it operated more extensively, it was without consideration, that Gill and Picklehimer insisted that Grayson had no title at the date of the deed, because, *as they alleged Andrew Hare*, had devised the land in the year 1800, to *John Hare*, and that therefore the decree against the unknown heirs of *Andrew Hare* passed no right.

The complainants therefore prayed for a decree compelling the heirs of John Hare, to convey to Gill and Picklehimer, and compelling the latter to accept such a conveyance, or for a decree for surrender of the possession, for rents and profits, and, for waste alleged to have been committed.

Gill and Picklehimer, in their answer, denied that there was any mistake in the deed, insisted that the bill contained no sufficient grounds for delaying or obstructing their legal rights, and denied that they held or had used any other land, since the contract with Triplett, than what they had in possession prior to, and at the date of that contract.

In an amended bill it was alleged that, since the filing of the original, Gill and Picklehimer had obtained a judgment against Triplett, for \$810 11, in the action of covenant.

On the final hearing, the circuit court dismissed the bill as to Gill and Picklehimer. And to reverse that decree this writ of error is prosecuted.

The record contains nothing that would authorize a reversal of the decree.

Bond, conditioned to convey land, by deed with general warranty—Deed with covenant that grantor has "right and lawful authority to sell and convey" and covenant of warranty made by third person and obligor, endorsement on bond by obli-

The alleged mistake has not been established. The denial in the answer was not as direct and specific as would have been perfectly satisfactory; but altogether, it was, in our opinion, sufficient to throw the onus on the plaintiffs in error. They offered no proof whatever, unless the deed, the bond, and the endorsement thereon, furnish intrinsic evidence of the alleged mistake. Triplett covenanted to make a general warranty deed simply. But the conveyance was made, not by him, but by Grayson; and therefore nothing in Triplett's bond can lead, *per se*, to the inference that there was a mistake in the covenants in the deed. Nor would any such de-

duction be necessary, or even reasonable, had Grayson, instead of Triplett, sold the land and covenanted to convey the title by deed of general warranty. TRIPLETT  
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The documents of title may not have been exhibited, and if they had been, nevertheless, the defendants in error may not have been competent judges of their character and effect; and therefore, as is quite usual and often proper, as a precautionary measure of perfect security, they might, and perhaps ought to, have required such a stipulation in the deed, as that we are now considering; for then, if the title were not complete, they would not have been bound to wait until actual eviction, as they would have had to do under a simple covenant of warranty. The endorsement on Triplett's bond is not inconsistent with the covenant as to the authority of Grayson to convey. It only imports that a conveyance had been accepted in discharge of Triplett's covenant. But it does not prove that Triplett had made that conveyance in his own name, nor that the deed which had been accepted, contained nothing not necessarily required by the bond. Such a deed as that made in this case, cannot be *thus* controlled or qualified.

A chancellor would not therefore, be justified in decreeing relief on the ground of mistake. Such a mistake, in such a case, should be established clearly and satisfactorily.

Nor does the alleged want of consideration, furnish any ground for relief, because, as already suggested, the defendants were not bound to accept a deed, without a covenant, as to the right to convey.

But the plaintiffs insist that, as a part of the land was, at the date of the conveyance, in the adverse actual possession of the defendants, and the residue was then in the adverse possession of a stranger, and known to be so by the defendants, the presumption is strong, that the parties did not contemplate such an absurdity as a covenant of *seizin*, in the face of the known and contradictory fact. We need not say what effect this circumstance might, of itself and alone, be entitled to have if the covenant in the deed had been a covenant of *seizin*, because we are clear-

gor, that deed has been received "according to the tenor of the bond." Grantor is discovered to have no title nor authority to sell, chancellor will not relieve obligor in bond, from action upon his covenant, that grantor had "right and lawful authority to sell and convey" upon allegations of mistake, in inserting such covenant, and that it was without consideration. Merely upon the effect of the bond, endorsement and deed, obligor not compelled to receive a deed without such covenant. Covenant that grantor has "right and lawful authority to sell and convey," is not covenant of "seizin" nor was it prior to July, 1824, incompatible with adversary possession, it only



**TRIPLETT ET AL. vs. GILL ET AL.** ly of opinion that, it cannot be construed, and was not intended to be such a covenant.

**GILL ET AL.** Grayson, without being seized in fact, or in law, imports vestiture of legal title and right to convey it. may, according to the law in force at the date of the deed, have had lawful right and authority to convey a legal title. The champerty act of 1824, did not take effect until July of that year.

The covenant in the deed imported only, that Grayson had a legal title which he had a right to convey; and did not imply that he had possession. Such a covenant was not broken by an adversary possession merely, but was broken only by a want of legal title in Grayson, such as he had a right to sell and convey. And this obvious interpretation of the language of the covenant is fortified, instead of being weakened, by the fact, well known to all the parties, that Grayson was not, in fact seized. It would be unreasonable to suppose that the parties, knowing and admitting that Grayson, was not technically seized, intended such an absurd and incongruous covenant as that of seizin. Such an interpretation would be suicidal.

**Court will not presume that parties did not understand their covenants according to their plain import.** Wherefore, whatever the parties may in fact have intended, or however they may in fact have understood the conveyance, this court cannot judicially presume that they did not understand the covenants in the deed, according to their plain and inevitable grammatical and legal import, or that they could have understood the covenant (as to the authority to sell) as meaning nothing, or as amounting only to a general warranty of title, especially as such a warranty immediately succeeded in another and distinct sentence.

**Question tried at law will not be re-examined in equity unless upon allegation of fraud in obtaining judgment at law.** As the question of title at the date of the conveyance was fully tried in the suit at law, and it was therein decided that Grayson had not then a legal title, we will not, in this case, reverse that decision, but must, *pro hac vice*, consider that matter as *res adjudicata* not to be revised in a chancery suit, without allegation of fraud in obtaining the judgment for damages. But, were we permitted to reexamine the question of title (upon the writ of error,) we should decide, (as will appear in the opinion succeeding

this, in the common law suit directly presenting the point) that Grayson had not the legal title at the date of his deed to the defendants.

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We will not say what effect on the equitable rights of the parties, an ability to make a good legal title, and an offer to do so, even on the hearing of this cause in the court below, might have been entitled to have, if such ability and such tender had appeared. Perhaps such a state of case might, under all the circumstances, according to the case of Cotton vs. Ward (III Mon.) have entitled the plaintiffs to some relief.

Party who does not shew title to land cannot claim restitution, rents or damages for waste.

But no other conveyance was offered, and the plaintiffs were not, on the hearing, in a condition to make one which would have passed the legal right once held by the grantee, A. Hare; nor is there any thing in this record, shewing, or even tending to shew, that they would ever be able to make such a title as the defendants have a right to demand. Before a title could be decreed upon Grayson's alleged equity, his heirs would be indispensable parties. They were not parties to this suit; and therefore, had there been no other obstacles to a decree, transferring the title from John Hare's heirs to the defendants, or to Triplett, or to Grayson's heirs, the fact that the latter are strangers to this suit, would be insuperable.

Before title can be decreed upon alleged equity of grantor his heirs indispensable parties.

As to the prayer for restitution, for rents, and for waste, it is necessary only to suggest that, as there is no proof that the defendants hold or have used any other land since the contract with Triplett, than they held under an adversary claim, prior to that time, and as the plaintiffs have failed to shew any title in themselves, or in Grayson, they were not entitled to a decree for waste, or for rents, and cannot claim restitution of a possession which they do not appear ever to have had.

Wherefore, upon the whole record, as it is presented to this court, the decree of the circuit court must be affirmed.

*Triplett*, for plaintiffs; *Haggin*, for defendant.

**TREMPER et al. vs. Gill et al.**

*Case No. 10,000. Circuit Court: Robbins Judge.*

**Demurrer. Evidence. Damages.**

The court sustained the demurrer to the Opinion of the Court. This writ of error is brought to reverse the judgment for damages, alluded to in the foregoing opinion.

After setting forth only the covenant, as to the right of conveyance, the declaration averred, as a breach, that he had not, at the date of the conveyance, "good right nor lawful authority to sell the premises in said deed mentioned."

A demurrer to the declaration having been overruled, Tripiett filed three pleas: 1st, that Grayson had good right and lawful authority to sell and convey the land; 2nd, that Grayson, by a decree of the Bath circuit court, had obtained a conveyance of the legal title from Andrew Hare's unknown heirs, (referring to the decree and the record of the suit in which it was rendered,) and concluding that therefore Grayson had a good right and lawful authority to convey, and averring that the plaintiffs in the action had never been evicted; 3rd, substantiality of the second, except the positive averment of title.

Demurrers were sustained to the second and third pleas, and thereupon the court, to whom the law and the facts were referred, gave judgment for \$200 in damages, after overruling a motion for a new trial.

The assignment of errors complains of the judgment on the demurrers, and of the refusal to grant a new trial.

I. The declaration and pleas No. 2 and 3 will first be considered.

The declaration is substantially good; the covenant is correctly described, and the breach is sufficiently comprehensive and specific to show a good cause of action. See II. Sanders on Pleading 181-6.

The second plea does not contain facts sufficient to show that Grayson had a legal title. The record

to which it refers, and on which it relies for proof of such title, does not show that the heirs of Hare were before the court by voluntary appearance, or by any service of process actual or constructive. It shows only that an order of publication was made against them as unknown heirs, but it does not contain any certificate or other proof of publication. The recital in the decree is insufficient. The evidence of the fact itself should appear in the record. A decree cannot be sustained unless the facts necessary to uphold it, appear in the record. According to the well settled doctrine of this court, the decree referred to in the plea, must be deemed *ex parte* and void. See *Peers vs Carter's heirs*, IV. Littell, 270; *Delano vs. Jopling*, I Ib. 417; and *Green's heirs vs. Breckenridge's heirs*, IV Mon. 545.

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facts necessary to uphold it appear in the record, recital in the decree insufficient. Certificate of publication must be in the record or decree deemed *ex parte* and void.

The averment that the defendants had never been evicted, was immaterial. An actual eviction is necessary to the maintainance of a suit for a breach of general warranty of title; but a covenant of *seizin*, or a covenant that the vendor has lawful right and authority to convey, is broken the instant it is made, unless, at that time, the vendor was *seized* or had lawful right and authority to convey; and, therefore, in these latter cases, an eviction is not material to the cause of action. The breach is as fatal and the cause of action therefor is as complete without eviction as with it.

Plaintiff never evicted, no answer to claim for damages upon breach of covenant that defendant had "right and lawful authority to sell and convey."

Wherefore, the third plea being no better than the second, the demurrers to both were properly sustained.

Three grounds were relied on for a new trial: 1st, That the circuit court erred in permitting a copy of A. Hare's will to be read as evidence on the trial. 2d, That the proof did not authorise any verdict against the plaintiff in error, and, 3d, That the verdict was excessive.

A. Hare died in the year 1800. The copy of his will which was read on the trial, had been made out and certified by Levi Todd, (the clerk of the county court of Fayette) in 1801, and filed as a true copy in a suit then pending between the personal representatives of the testator and the trustees of his

Copy of will admitted as evidence, being the best that under the facts established, could be had

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T AL.  
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Deputy clerk  
has a right to  
subscribe the  
name of his  
principal.

widow. The copy is in the hand writing of one of the clerk's sons, and the words, "*A copy test, Levi Todd, c. c. c. f. c.*" were in the hand writing of a qualified and acting deputy of the said clerk. The deputy was, at the time of the trial, and had been ever since 1817, living in Missouri, and the clerk himself died in 1807. The clerk's office had been consumed by fire in February, 1803, and the books in which wills had been recorded, and the county court books containing entries of probate, and nearly all the original wills on file in the office, had been totally destroyed in the conflagration. Hare's executor died in 1826.

By an endorsement made on the copy at the time it was certified, it appeared that the original had been proved by two witnesses, and ordered to be recorded in the year 1800.

Upon these facts, which were all clearly proved, the copy was admitted as legitimate evidence, and, we think, properly admitted.

Under all the circumstances, a higher grade of proof should not be expected or required.

We cannot presume that the county court of Fayette had no jurisdiction, nor that the original will was not duly proved and admitted to record in that court. The copy is as well authenticated as it could be. The deputy had a right to subscribe the principal clerk's name.

By the will, the land now the subject of contest, was devised to John Hare; and therefore, if the decree in favor of Grayson against the unknown heirs of Andrew Hare, had been valid, it could not have vested the legal title to the land in Grayson, or divested the heirs of the devisee (John Hare) of their exclusive legal right thereto; consequently, there being no other proof of title in Grayson, the issue was rightly found for the defendants in error.

Criterion of  
damages for  
breach of cov-  
enant of title,  
the considera-  
tion actually  
paid and in-  
terest.

But the verdict was exorbitant. The consideration, with legal interest thereon, furnished the maximum of the plaintiff's liability: See *Staats vs. The executors of Ten-Eych*, III. Caine's Reports, 111; and *Pitcher vs. Livingston*. IV Johnson's Reports, 1; and the authorities therein cited.

The deed made by Grayson acknowledged the receipt of the consideration; and the court gave judgment for the consideration so acknowledged, together with legal interest thereon from the date of the deed.

HAY  
vs.  
McKINNEY.

But Triplett's original covenant shows that the consideration was payable in two equal annual instalments, neither of which had become due at the date of the deed. It is evident, therefore, that the verdict and judgment exceed the legal criterion, unless the acknowledgement in the deed is conclusive proof that the whole consideration has been paid, or was due at the date of the deed. It has been hitherto decided by this court, that such an acknowledgement is not conclusive: and in this case, we are of opinion that the original contract is the better evidence; because it is of equal dignity with the deed, and has never been cancelled or surrendered; because it is not necessarily inconsistent with the acknowledgement in the deed, and because it is intrinsically improbable that the consideration was actually paid so long before it was due; moreover, it is manifest from the record of the chancery suit, read as evidence in this case, that the whole consideration had not been paid, and was not due at the date of the deed.

Acknowledgement in deed of consideration paid, does not conclude party from showing that it has not been actually paid,

Interest should be calculated from the time the principal was paid, or was payable. This is the utmost of the maximum right of the defendants in error in this case.

Judgment reversed, and cause remanded for a new trial.

*Triplett*, for plaintiff; *Haggin*, for defendant.

## Hay vs. McKinney.

CHANCERY.  
Case 142.  
October 8.

THE decree is erroneous, in several particulars:

1st. *Mrs. Williams* was not before the court by legal service. There is no proof that the publication against her was made according to law, the cer-

Decree reversed for want of proper certificate of publication.

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vs.  
MORROW.

tificate not having been made by "*the printer in whose paper*" the publication purports to have been made, but by the editor only.

Decree in  
specie for a-  
mount due in  
Co'n'lth's  
paper, is erro-  
neous.

2nd. If any decree against Hay had been proper, it should not have been for \$172 in specie, as there was no proof that he owed Mrs. Williams that much, or more than that sum in Commonwealth's paper.

2nd. section  
of an act of  
1766, 1 Dig-  
est, 59.

3rd. No security was required of the complainant, according to the second section of an act of 1796, 1 Dig. 59.

Wherefore, without deciding whether the bill and exhibits present any equitable ground for relief for the surplus land, the decree is erroneous.

Decree reversed, and the cause remanded for further proceedings.

EJECTMENT.

### Smith vs. Morrow.

Case 143.

Appeal from the Fleming Circuit; ROOPER, Judge.

*Patentee. Interference. Possession. Limitation, statute of. Grantor competent witness.*

October 8.

Judge UNDERWOOD delivered the opinion of the court.

MORROW, claiming under a junior patent, instituted an action of ejectment and recovered. His right depends upon the fact, whether he had 20 years continued adverse possession, under the junior grant, within the interference prior to the entry of Morrow. This question is made upon the evidence in a motion for a new trial, which the circuit court overruled, and is the first which we shall dispose of.

Morrow claims under Trimble, the junior patentee. The suit was commenced in 1820. According to the evidence, Morrow settled on the tract of Trimble, who was his father-in-law, on the outside of the lines of the elder patents, in the year 1797, and in the year 1798, extended his enclosure within the boundary of the elder grants. It does not appear how far Morrow was authorized to take possession by his father-in-law. The nature and extent of the contract between them, is not shewn. Trimble, conveyed to Morrow, in 1802. Prior to that

time, Morrow held as Trimble's tenant, and having entered within the lap in 1798, by actually enclosing part thereof, it may be inferred, that Trimble, the patentee, was in actual possession of his entire tract, before he conveyed part thereof, in 1802, to Morrow, and thus connecting the possession of Trimble, acquired by the entry of his tenant, Morrow, with the possession of the latter, under his deed, and more than 20 years continued adverse possession, will be established, prior to the institution of the action.

SMITH  
vs.  
MORROW.

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It is contended, however, that the following facts shew, that Morrow surrendered all pretensions to an adverse possession of the land, in contest, as far back as 1808. In that year, Morrow went to Weathers Smith, who claimed the land under the elder patents, and contracted with him for 59 acres, including all the enclosures made by him. Morrow as a surveyor, laid off the 59 acres, and the sons of W. Smith carried the chain. W. Smith executed a bond to Morrow for the conveyance of the title. After this was done, Morrow, on several occasions, to different persons, acknowledged that the land on the out side of the 59 acres, and within the interference, was Smith's, and that he had no right to take timber from it, and assigned that as a reason why he was hauling timber from places more remote to make improvements.

Conduct of  
plaintiff in  
ejectment  
may operate  
an abandon-  
ment of his  
possession of  
an interfer-  
ence.

Weathers Smith executed a deed to the appellant, in December, 1813, purporting to convey to him the land in controversy, and much more. The appellant settled on the out side of the interference, but in 1815, extended his fence, at one place, a small distance across Trimble's patent line, within the lap, and in 1817, at the latest, he enclosed a spring within the interference, claiming the land according to his deed, which binds on the 59 acres which W. Smith had contracted to Morrow as aforesaid. It moreover appears that Morrow, as the surveyor, laid off the land to enable W. Smith to convey it to his son, the appellant, and that he set up no claim to it at that time. It also appears in proof, that he wished to exchange other lands with the appellant for those in contest.



SMITH  
vs.  
MORROW.

The foregoing facts, all of which seem to be unopposed by any contradictory evidence, do, in our opinion, show conclusively, that Morrow voluntarily restricted his possession within the interference to the 59 acres contracted for with W. Smith in 1808, and that his conduct from that period until the institution of this suit, clearly manifested an abandonment of the possession to the residue of the interference, in favor of the elder grants. Under these circumstances, the extension of the fence across the line of Trimble's patent in 1815, and the enclosure of the spring in 1817, were such acts of entry on the part of the appellant, as gave him the possession in fact, of the land described in his deed of 1813. It follows that the plaintiff had no right to recover upon his possession against the elder patents, and that the court should have granted a new trial, the verdict being contrary to law and evidence.

An adverse possession may be changed by the agreement of the parties, into a friendly one, and the operation of the statute of limitations thereby defeated.

The case of Mill's heirs and Dale vs. Bodley, IV. Mon. 248, shows that an adverse possession may be changed by the agreement of the parties, into a friendly one, and the operation of the statute of limitations thereby defeated. It would hardly be contended that Morrow, after contracting with W. Smith for the 59 acres, and accepting his bond for a title, could insist upon an adverse possession to that parcel. We see just as little reason, under all the facts proven, to tolerate an adverse possession to the residue of the interference, which he did not bargain for, and on which he had no improvement.

There are some other questions presented which we shall notice, as the cause must be remanded for a new trial.

Grantor in a deed is competent to prove its execution, so far as his title and interest has passed by it, or in other words, so far as he was concerned in its execution.

In the progress of the trial in the circuit court, the grantor in a deed to which there was a subscribing witness, was not permitted to prove the execution of the deed because the subscribing witness was not called, and his absence not accounted for. The general rule is, that whenever the execution of an instrument is called in question, the subscribing witness must be produced. But notwithstanding this rule, we are of opinion, that the grantor in this case was competent to prove the execution and delivery

of the deed, which the court rejected, so far as his title and interest had passed; or in other words, so far as he was concerned. But in respect to his co-grantors, he was not a competent witness, for they might have executed the deed when he was not present, and as to their execution of it, he is not necessarily presumed to have any knowledge. The production of the subscribing witness is indispensable, if within the power of the court, when the deed is denied by the party executing it. That was the case in *McMurtry and Peebles vs. Frank*, IV. Monroe, 40. But where the grantor or obligor instead of denying, affirms the deed which divests him of an estate or right, we can perceive no possible reason why he should not be permitted to prove, that he had executed the instrument parting with his estate or right. The very reason why a witness is necessary in any case, results from the possibility that the grantor or obligor may deny the deed. It is to fortify the grantee and to enable him to counteract the effects of such a denial, that a witness is called to subscribe the deed. Were it always certain that grantors would, when necessary, go forward and acknowledge and prove the execution of deeds a subscribing witness would be altogether useless.

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But one grantor is not competent to prove the execution of a deed by his co-grantors. When grantor acknowledges the execution of the deed or is ready and willing to be a witness to prove it, it is unnecessary to prove its execution by the subscribing witness.

We shall notice but one point more. In the agreement before the jury, the attorneys made a question as to the time when Morrow's adverse possession commenced. Smith's council appealed to the court to instruct the jury, that cutting of house logs or other timber within the interference, was not such possession as to justify the jury in fixing the time when the limitation began to run at the date of cutting timber; and moreover, that to constitute an adverse possession, there must be an actual *enclosure* or *residence* within the interference. The court refused to give the instructions asked for, but told the jury that "an actual enclosure or residence upon the land, to take possession, was not required by law; and that the jury had a right to date Morrow's possession from the time he manifested an intention to clear and use the land as his own land."

SMITH  
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Before the right of the elder patentee to enter upon the land is tolled, there must be 20 years adverse possession in fact.

Statute of limitations does not commence running from time an individual manifests an *intention* to clear and use land as his own.

Before the right of the elder patentee to enter upon the land is tolled, there must be twenty years adverse possession in fact. Now, an entry upon land and cutting timber, may be altogether tortious, but it is still such an use of land as the real owner is accustomed to make of it, and therefore such an act may, in the general, be regarded as manifesting an intention to use the land as the trespasser's own. If such acts of ownership were continued occasionally, at short intervals, for twenty years, they would not confer such an adverse possession upon the trespasser, as would enable him to rely on the statute of limitations.

Neither can the statute of limitations, with propriety, be said to commence running from the time an individual manifests an intention to clear and use land as his own. There are various modes of manifesting an intention to do a thing. Words alone will do that; and there are actions performed by individuals which frequently manifest *intentions* to do things even contrary to their declarations. A man may manifest an intention to clear and use land as his own, and yet never enter upon it; casualty or a second thought may induce him to alter his intentions and abandon a project fully resolved on. In such a case it would be strange to apply the statute of limitations in his favor, and after a lapse of twenty years, authorize him to maintain an action of ejectment and evict the possessor. We therefore, regard the language of the court as altogether too indefinite. It wants that precision and clearness which should always be aimed at in giving instructions to a jury. The statute commences running according as facts do, or do not, exist, and not as this or that intention may have been manifested. The fact upon which the bar of twenty years rests is an adverse possession. Before the junior patentee can acquire such a possession, we deem it essential that he should have entered upon the interference and commenced an improvement of a permanent character, if it be woodland in the wilderness state, and carried on the improvement begun by continued acts until it shall be completed. If an improvement so made shall be enjoyed until there is twenty years

complete, from the date of such an entry, then the statute may be applied from the date of the entry and commencement of the work; but occasional chopping within the interference, and carrying away timber, will not do. Under this view, neither the instructions asked, nor those given, meet our approbation.

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We go back to the time of beginning the work which is completed by an actual enclosure, provided the work is prosecuted with reasonable diligence until finished. Thus if the junior patentee shall enter on the lap in January, and continue to clear until April, when he encloses the ground, we should fix on January as the time when the statute commenced running, instead of April. Upon another trial, it cannot be difficult to make the instructions given, conform to our views of the law, when applied to the facts of the case.

An entry with an intention to possess, made by a junior patentee within the lap, is not sufficient to confer such a possession as will start the statute of limitation to running, unless it be accompanied by a continued holding from that time, demonstrated by acts ripening into improvements made upon the interference.

The intention with which an entry is made upon land, is often an important matter, and the facts proving or manifesting such intention are often legitimate subjects of investigation before the court and jury. But an entry with an intention to possess, made by a junior patentee within the lap, is not sufficient to confer such a possession as will start the statute of limitations, without it be accompanied by a continued holding from that time, demonstrated by acts ripening into improvements made upon the interference. Removing timber cut within the interference to improve land without, is a very different matter, and too equivocal to make the foundation of a possession in fact. Such use of timber gives no seizin, as was decided in the case of *Smith &c. vs. Morrow*, V. Litt. 216.

Judgment reversed, with costs, and cause remanded for a new trial.

Read, for appellant; *Morehead* and *Brown*, for appellee.

## CHANCERY.

## Anderson vs. Green.

Case 141.

Appeal from the Grays in Circuit; BOOKER Judge.

*Voluntary conveyances. Subsequent purchaser for valuable consideration.*

October 8.

Judge NICHOLAS delivered the opinion of the court.

Whether a subsequent sale and conveyance for valuable consideration renders a prior voluntary conveyance absolutely null and void, or only affords presumptive evidence of its being fraudulent, subject to be rebutted by counter proof? Quere. And whether notice by subsequent purchaser, of the prior voluntary conveyance will give validity to the prior voluntary conveyance? Quere.

BENJAMIN SEBASTIAN, for love and affection and by way of advancement to his son William, executed to him a bond for the conveyance of a tract of land. Shortly thereafter William married, having previously exhibited the bond to his wife and her father, who both state that, the proviso made for him by the bond, was an inducement with them for assenting to the marriage. After residing on the land upwards of two years, claiming and using it as his own, and making some expenditures towards improving it, William Sebastian sold it to Green, and assigned him the bond. About the same time, but shortly afterwards, Benjamin Sebastian sold and conveyed the land to Anderson, who, at the time of his purchase, had notice either express or constructive of Green's claim. Anderson brought an action of ejectment and recovered judgment against Green, who then filed his bill enjoining judgment. On final hearing, the injunction was perpetuated, and Anderson decreed to release and convey his title to Green. From this decree Anderson appeals.

It is urged in his behalf: first, That the bond is fraudulent and void as against him, for want of a valuable consideration.

Second: That, for the same reason, the chancellor will not enforce a specific performance of the bond.

The first point has brought under review, the important and much agitated question, whether, a subsequent sale and conveyance, for valuable consideration, renders a prior voluntary conveyance absolutely null and void, or only affords presumptive evidence of its being fraudulent, subject to being rebutted by counter proof. After an attentive review of all the ante-revolutionary decisions in England on this subject, that were within my reach, and I

have seen nearly all of them, I have come to the conclusion that, according to the weight of those decisions, a voluntary conveyance, as against a subsequent purchaser, for valuable consideration, is absolutely void. Such is my impression of the decided preponderance of the cases, that way, that I do not feel at liberty to alter such a course of decision, even if I might otherwise be disposed to do so. See *Taylor vs. Stile*, cited *Sugden on Vendors*, 464; *Roberts on Fraudulent Conv.*; *Sterry vs. Arden*, 1 *John. Chy.* 266, and the numerous cases there cited.

We were much pressed in argument with a contrary decision of the Supreme Court of the United States, in an opinion delivered by Chief Justice Marshall, *Cathcart vs. Robinson*, 5 *Peters* 265. It is there held, that according to the weight of anti-revolutionary English decision, the subsequent sale furnished only a strong presumption of fraudulent intent, which threw on the person claiming under a voluntary settlement, the burthen of proving it to have been made in good faith. However high may be the authority of that court, I may be permitted to decline following it on a point like this, where neither argument nor authority is used to sustain its opinion. It is not the wont of the American profession to acquiesce in or adopt the mere rescripts of any court. I think with Chancellor Kent, that no one who will attentively examine the cases referred to by him, can well hesitate as to the correctness of the conclusion drawn by him, and which I have adopted, that the weight, number and uniformity of the authorities, do very much preponderate in favor thereof. Besides the case of *Cathcart vs. Robinson* is obnoxious to so much just observation as to the propriety of its determination on the only point presented for decision, that it must ever remain difficult to maintain for it, its imputed weight and authority.

*Cathcart* conveyed to a trustee, by recorded deed, all his property, for the benefit of his wife and children, and among other things, a claim which he had against the United States. He afterwards covenanted, for value, to convey the same claim to *Robinson* as collateral security, for the performance of an

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agreement between them. The question was whether the court should postpone the transfer to the trustee, and decree satisfaction to Robinson out of that claim. The transaction arose in the District of Columbia, where the court says, the statute against fraudulent conveyances of 27 Eliz. is still in force, and under that statute, the decision professes exclusively to be given. Without determining the effect of recording the deed on the question of notice, the decree treats Robinson as a purchaser without notice, and decrees satisfaction to him out of the claim on the government. The statute 27 Elizabeth does not in terms, nor was it ever before construed to embrace personalty or *choses in action*. On the contrary it has been repeatedly adjudged that it does not. The original transfer of the claim and subsequent agreement to assign it to Robinson, did not, therefore, present a case arising under that statute, or at all to be controlled by its provisions. There was no case made out to bring it within the operation of the 13 Elizabeth, and give to Robinson the benefit of the attitude of a creditor. And if there had, the decision would still have been unauthorized, either by former adjudications, or the analogies of the law. That statute though much broader than the other, has, almost uniformly and by much the better authorities been held not to embrace *choses in action*.

A fair purchaser, for valuable consideration, without notice of a prior voluntary conveyance, is a much more meritorious claimant, in the general, than the volunteer; is much better entitled to the regards and protection of the law, and in a question *de damno evitando* as between them, the volunteer should suffer. To give efficiency, stability and certainty to the protection afforded the purchaser, I think those courts have best pursued the true spirit and policy of the statute, who have declared voluntary conveyances absolutely void as against such purchaser, and not left it to the uncertain and vacillating determinations of courts and juries, to ascertain whether the circumstances of each case were sufficient to repel a mere presumption of fraud. This construction given to the statute, with the in-

tent to afford its beneficial provisions full scope, is not more rigorous or less called for by the interests of society, than the totally vitiating effect which has been imposed upon sales of chattels, where the possession does not accompany the conveyance. The two rules are in perfect consonance and serve to fortify and sustain the policy of each other. They are alike indispensable to that certain and efficient protection of purchasers and creditors, which it was the intention of the statute to afford. The hardships of mere individual cases, must in all wise legislation, be comparatively disregarded; in the attaining of great results for the benefit of the whole community.

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But, whilst I admit and acquiesce in the conclusive authority of the ante-revolutionary decisions upon the absolute fraudulency of a voluntary conveyance, as against a subsequent purchaser without notice, I by no means feel equally concluded by them and bound to say, that such conveyance is void as against a purchaser with notice. There was such contrariety and confliction of decision on this subject, that we are left free to take our own course, and I think we should adopt that which sustains the voluntary conveyance against a purchaser with notice. The first revolutionary English decisions have repeatedly and conclusively settled it the other way, and I could not but have felt great hesitancy in following my own view of the subject, if many of their own ablest and most distinguished judges and jurists, had not expressed unequivocal disapprobation of the rules as there established. Chancellor Kent has expressed his opinion decidedly in the same way, though in *Starry vs. Arden* he follows the rule as settled in England, See IX. East 71, IV Bos. and Pull 335; 1 Fonb. 281; Sug. Vend. 475; XVIII Vesey, 101; II Meriv. 123. Mr. Roberts in his treatise on fraudulent conveyances, has given an elaborate and most able argument in favor of the rule as established in England, and has probably exhausted that side of the question. His reasoning, however, is not convincing. It is purely technical and attains its conclusion by a process too refined and artificial for the test of ordinary legal rules. The



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most of it is based upon what I conceive to be a misapplication of the principle established in Gooch's case, V Co. 60, that a purchaser shall avoid a fraudulent conveyance notwithstanding he has notice of it. The statute does not avoid voluntary conveyances, nor declare them fraudulent. They are good between the parties, are aided and enforced by courts of justice, are oftentimes just and meritorious, have not necessarily any vice or illegality intrinsically appertenant to them, and are merely rendered the victims of subsequent *bona fide* purchasers, by means of an artificial rule of legal presumption. The behests of society seem to require that they should be held void, as against a purchaser without notice, but I do not perceive the necessity of carrying this rule of mere judicial creation to the extent of avoiding them in favor of purchasers with notice. The full protection of *bona fide* purchasers without notice, by no means requires it. When a rule is prescribed by statute, I can feel the weight of the argument, which urges the enforcement of its letter, even beyond what the mere prevention of the mischief provided against, would seem to require. But I cannot recognize the soundness of the argument, which insists upon a similar extension of a rule of judicial origin. If the rule be, as it certainly is, one of our own framing or adopting, I cannot see why the courts may not so frame and apply it as to prevent it from defeating its own ends. It was framed in aid of the statute to protect innocent and *bona fide* purchasers. It should not be extended to the protection of *mala fide* purchasers with notice. To do so would render the statute an instrument in the accomplishment of fraud.

The statute had a two fold object, the protection of innocent purchasers and the punishment of fraudulent vendees. Where there are circumstances of intrinsic fraud in the transaction, the vendee must be a participator in the fraud, and it may be well, as in Gooch's case, to let the statute operate full out to its very letter, avoiding the fraudulent conveyance, even though the purchaser had notice. But the fraud in voluntary conveyance, most times consists in mere legal artificial presumption, without any

necessary intendment of participation in it, on the part of the vendee. To destroy his conveyance in favor of a purchaser with notice, would not only reward the vendor on whom the whole imputation rests, and thereby hold out an inducement for the violation of his own solemn engagements, but, it would also encourage on the part of the purchaser, "a breach of that good faith, which is morally due to the fair claims and interests of others."

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The registering acts of England, expressly declare deeds not registered, fraudulent and void, against subsequent purchasers. Yet the courts of that country, looking to the intent of the act, have determined that a purchaser with notice of an unregistered deed, was not within its protection. This seems to me to have a strong bearing on the point under consideration, though it is not noticed in any of the various discussions of the subject that I have met with. The language of the two acts is equally denunciatory and unqualified. It would seem, therefore, from analogy, as there is no just imputation of fraud against the alienee of a voluntary conveyance, that if the statute had expressly declared voluntary conveyances void, as against subsequent purchasers, the courts should have construed it to mean purchasers without notice, and not have extended its nullifying effects in favor of purchasers with notice. Every reason, which justifies the one course of decision, would seem equally to authorize and require the other. Much rather, therefore, should such be the decision, when it is admitted, that voluntary conveyances do not come within the letter of the act, but are only brought within it, by a rule of construction. In fine, I deem a purchaser with notice, not within the spirit and protection of the act, and that a voluntary conveyance should not be avoided for his benefit.

The Chief Justice and Judge Underwood, not deeming it necessary to decide in this case, the important question noticed in the foregoing view, forbear to express any opinion upon it; they will not, therefore, intimate either concurrence in, or dissent, but will reserve an expression of their opinion, until a case shall occur, requiring a direct decision of the point, one way or the other.

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But, there is another view of the case, in which we all concur, that will result equally unfavorably for Anderson's claim.

In consideration of love and affection and for advancement of his son, the father executes to his son a bond for the conveyance of a tract of land, the son marries, then sells the land and assigns the bond to his vendee, and after this, the father sells and conveys the land for valuable consideration to a person who had notice that the son had assigned the bond; decided, that the marriage of the son and the assignment of the bond, previous to the sale and conveyance made by the father for valuable consideration, rescues the bond and assignment from all previous liability to be avoided by the purchaser from the father for valuable consideration.

It is the effect given by us, to the marriage of William Sebastian, after the execution of the bond, and under the circumstances mentioned, and to the sale of the land made by him to Green. In our estimation, they so far supplied a valuable and valid consideration to the transaction, as rescued it from any previous liability to be avoided by the after purchase of Anderson.

In the leading case of *Prodgers vs. Langham*, 1 Sid. 133, it was determined, that on the marriage of a daughter, who was a voluntary alienee of the father, the conveyance ceased to be voluntary, became supported by a valuable consideration, and was unimpeachable by a subsequent purchaser from the father. A similar determination on the same point was made in *Sterry vs. Arden*, before cited.

It is said, 1 Mad. Chy. 272, if a man makes a voluntary conveyance of land, and the alienee sells the same for valuable consideration, the alienor is bound. So on an appointment, he who pays a consideration to the voluntary appointee, may constructively be held in the same situation, as if he had in the first instance paid it to him by whom the estate was granted.

So also, 1 Fonblan, 280, though a conveyance be covinous in its creation, it may acquire validity by subsequent matter, as where land conveyed, be afterwards aliened or settled for valuable consideration. See also, Sugden on Vend. 471.

The second ground of objection to the decree has no legal foundation. It is in the general true, that the chancellor will not enforce a mere voluntary agreement; but, it was decided by this court in the case of *McIntire vs. Hughes*, 14 Bibb, 186, that a voluntary bond from father to son, for the conveyance of land, would be specifically enforced. Besides the very satisfactory reasoning of that case, it is sustained by most abundant authority. *Newland on Con.* 69; 1 Fon. 348; *Mynturn vs. Seymore*, 14 John Chy. 590, and authorities cited.

The decree must be affirmed with costs.

*Monroe and Denny*, for appellant; *Crittenden and Pirtle*, for appellees.

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ADM'RS. &C.

## Carneals vs. Parker's Adm'rs. &c.

CHANCERY:

Error to the Franklin Circuit; MAYES, Judge.

CASE 145.

*Rescission of contracts. Mistake. Limitation, statute of.*

Judge NICHOLAS delivered the opinion of the court.

October 8.

THOMAS CARNEAL, by bonds dated 10th July, 1788, bound himself to convey or assign to Alexander and James Parker, one fifth of the land to be obtained by the location of sundry land warrants placed by him in their hands for location. After the death of Carneal and James Parker, a compromise was made between Alexander Parker as surviving obligee, and James Coleman as the administrator with the will annexed, of Carneal, of the claim of the Parkers on Carneal, for the location of the warrants, in consequence of which, Coleman conveyed to Parker a part of the land so located, and Parker receipted and surrendered the bonds of Carneal. This took place in 1812. Some time thereafter, the administration granted to Coleman was revoked, and administration granted to Thomas D. Carneal. In 1821, Parker filed his bill in chancery against the heirs, devisees, and administrator of Thomas Carneal, alleging that Thomas Carneal had never had a patent for the land so conveyed to him, as had been supposed by him and Coleman, at the time of the compromise, but had, as Parker afterwards discovered, assigned the platt and certificate, in his life time, and a patent had issued to another person. He prays compensation for the land so conveyed to him by Coleman, under the compromise, from the representatives of Carneal, together with such other relief as he might be entitled to.

His claim was met on the part of the defendants, among other grounds of defence set up, by the plea of the statute of limitations, and as we have come to the conclusion that that plea must defeat his re-

Lapse of five years is a bar to a bill for rescission of a contract on

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covery, we have only stated so much of the case as to show its bearing.

the ground of mistake. In such cases, the time will no commence running until the discovery of the mistake. On bill for rescission of a contract on ground of mistake, filed five years after the making of the contract, if the bill fail to allege, or to give any reason for presuming, that the mistake was first discovered within five years next before the institution of the suit, and defendant has plead the statute of limitations, the plea must prevail.

The basis of his claim as it now exists against Carneal's estate, in this suit, is his right to rescind the contract of compromise, on the ground of the mutual mistake, as to Carneal's holding the title to the land conveyed by Coleman. The question, therefore, is, whether Parker's right to obtain a rescission and compensation for the injury sustained by reason of the mistake, is barred by the lapse of five years. We think it is. The same question has been heretofore so decided by this court, in the analogous case of Crane vs. Prather, IV J. J. Mar. 76. It is true, as settled in that case, that the time will not commence running, in a court of chancery, until the mistake is discovered. But Parker has failed to allege, in his original or any of his amended bills, or to give any reason for presuming that the mistake was first discovered within five years next before the institution of his suit. The plea of the statute of limitations must, therefore, be adjudged a valid defence, and bar to his recovery.

Wherefore, the decree of the circuit court is reversed, and the cause remanded with directions to dismiss the bill with costs.

Carneals to recover costs on both writs of error.

*Haggin, Monroe, Morehead & Brown*, for Carneals;  
*Denny and Talbot*, for Parker.

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Case 146.

October 9.

## Talbot vs. Todd.

Error to the Gallatin Circuit; *MAYES*, Judge.

*Final decree. Partition. Jurisdiction. Commissioner's report. Current interest.*

Chief Justice ROBERTSON delivered the Opinion of the Court. SAMUEL TODD sued Isham Talbot in chancery, in the Gallatin circuit court, for partition of a tract of land held by them as tenants in common, in the county of Gallatin, and for money alleged to be due from Talbot to Todd, in consideration of Talbot's interest in the land, and of pay-

ments by Todd for taxes and improvements. The bill alleges that Todd bought the land from W. S. Waller in 1814, for \$3500, (which he paid in August, 1814,) and sold to Talbot an undivided moiety of the tract, for which he covenanted, on the 26th of October, 1814, to pay one half of the original consideration, to-wit, \$1750; that Talbot paid \$600 on the 26th of October, 1814; \$900 on the 26th of October, 1815, and \$225 on the 1st of September, 1816, leaving \$82 12½ still due and unpaid, and which had never been paid; that Todd paid \$42 98 cents for taxes on the land in 1816, for one moiety of which (\$21 49 cents) Talbot was justly liable to him, but had failed to pay: that, pursuant to his contract with Waller, he had sued one Buckhannon, who was in possession of the land under an adverse claim, and having obtained a judgment of eviction, had to pay him, for improvements, \$1335, with legal interest thereon from the 24th of November, 1818: that, Waller having conveyed the legal title to them, as tenants in common, they agreed, after the eviction of Buckhannon, that Talbot should have the lower end of the tract, including the improvements, and would pay to Todd the amount which he had paid for those improvements; and that, in consequence of that agreement, Talbot forthwith entered upon the lower end of the tract, and had ever since occupied it, and Todd had occupied and improved the other end; but that Talbot had failed to pay any of the aforesaid sums, alleged to be due to Todd, and had virtually refused to make partition of the land according to the agreement.

The subpoena was executed on Talbot in Franklin county, on the 20th of March, 1828, and afterwards, at the August term, 1828, Talbot having failed to file an answer or enter an appearance, the bill was taken for confessed, and a decree was rendered against him for partition, according to the agreement set forth in the bill, and also for the costs of the suit, and for \$82 12½ cents, with legal interest from the 1st of September, 1816; for \$21 49 cents, with interest from the 1st of January, 1817, and for \$1335, with interest from the 24th of November, 1818. The commissioners appointed to

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make the partition, were directed to divide the land equally, according to quantity and quality, without regard to improvements, assigning to Talbot the lower and to Todd the upper end, and were also directed to report at the next term the manner of executing the decree; and execution for the sums of money decreed to Todd was expressly authorized by the decree.

At the succeeding November term, Talbot was permitted by the court to file an answer in the nature of a cross bill. Todd answered, and, among other things, insisted that the decree was final, and could not, therefore, be opened by the circuit court.

At the November term, 1829, the court, considering the decree, rendered in 1828, final, set aside all subsequent orders and proceedings.

To reverse this last decree, as well as the first, Talbot prosecutes this writ of error, and insists, 1st, that the decree of 1828 was only interlocutory; 2nd, that the circuit court of Gallatin had no jurisdiction of the money demands; and; 3rd, that the decree is, in many respects, manifestly erroneous and unjust.

These objections to the decree will be briefly considered in the order in which they have been stated.

I. So much of the decree as directs the payment of the costs and of specific sums of money, is clearly and indisputably final, and this part of the decree tends to show that the circuit court understood the remaining part of it, directing the partition, to be final also. The decree is an unit and entire; it is denominated, on its face, final, and directs the payment of the costs of the suit.

These considerations would not, however, render the whole decree final, if, in its nature and effect; it had been, in any particular, clearly interlocutory. But it seems to us that the decree is not clearly interlocutory, but is intrinsically final in every respect, so far as the right to money, and to a partition, and the mode of partition were involved, or were subject to doubt or controversy. "

The decree recognised and established the defendant's right to the moiety of the land claimed in his bill, as resulting to him in equity, from the alleged contract between him and the plaintiff, and directed a partition accordingly, and a report of it at the next term. The decree adjusted the rights of the parties, and all that remained to be done, was to execute and carry into complete effect, that which had been settled by the court. Had the commissioners made a partition pursuant to the decree, and reported it at the next succeeding term as required, the partition, as decreed and as thus effectuated, would have been irrevocable by the same court. After the expiration of the term at which the decree was rendered, the only power of the court was to enforce the decree. If the commissioners had made an erroneous division, their report might have been quashed; but if they had properly executed the decree, their partition would not have been subject to correction by the court. The act enjoined on them was ministerial, and the decree required its performance before the next term. We deem such a decree as essentially final, as would be a decree directing commissioners to make a conveyance, and report the deed at the next term. It seems to have been deemed final by the chancellor when he rendered it; it possesses the distinctive attributes of a final decree; in its essence and effect it finally adjusted the rights of the parties, and was, therefore, a final decree.

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Decree for the specific sums of money in the bill mentioned, and for a partition of land, appoints commissioners to make the partition of the land and directs them to report at next term of the court, decided, that such decree is final. If the commissioners make an erroneous report, it may be quashed; but if they properly execute the decree, their partition is not subject to correction by the court.

II. The jurisdiction of the circuit court of Galatin over the whole case, as presented by the bill, and settled by the decree, may be sustained on two grounds: 1st. The defendant had an equitable lien on the plaintiff's interest in the land, and though the bill contains no specific prayer for enforcing such a lien, still, as there is a prayer for partition according to equitable principles, and for a decree for the money demands asserted in the bill, the prayer for general relief according to the rights of the parties and the justice of the case, was sufficient to have authorized an enforcement of the equitable lien; had the defendant desired a decree to that effect. 2nd. Having jurisdiction to decree a partition, the circuit



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court of Gallatin had ample jurisdiction to effectuate that partition according to all the rights incidentally affecting it, and to take cognizance of all matters incident to, or resulting from the original contract by which the plaintiff acquired his interest, or from the contract of partition alleged to have been made between the parties: *moreover, the decree is virtually for a specific execution.* Wherefore, according to the allegations of the bill, the circuit court of Gallatin had jurisdiction to render the decree which it pronounced in 1828.

And consequently, the decree of 1829 was right.

III. Having decided that the decree (of 1828) is final, and that the circuit court had jurisdiction, it is not permitted to us to examine the merits of the case as presented by the cross bill, and the proceedings subsequent to the filing of it; and we shall not, therefore, intimate whether or not the allegations of the bill would be essentially affected in equity by the cross bill, and subsequent proceedings, if we were allowed to consider them. In revising the decree of 1828, this court is restricted to the allegations of the bill which were properly taken for confessed. And we are clearly of the opinion that, admitting those allegations to be true, the decree of 1828 is free from just exception, so far as it directed the mode of partition and the payment of the three several sums of money, with interest, to the date of the decree; to this extent the direct and explicit allegations of the bill, fortified by all proper or necessary exhibits, clearly sustain the decree upon obvious principles of equity.

On partition of land allowance of *current* interest on the amount paid, by one tenant in common, for improvements and taxes on the land, decided to be erroneous.

But, in allowing *current* interest on the amount paid for improvements and for taxes, the circuit court erred. The decree, with this exception, must be approved. In remanding the case in consequence of this solitary error, we cannot feel authorized, in the exercise of a sound and regulated judicial discretion, to do more than to direct a proper modification of the decree, so as to render all parts of it such as should be approved. The court having had full and complete jurisdiction; the bill having been properly taken for confessed, and the whole decree,

with only one slight exception, not affecting the more fundamental and essential parts of it, being approved by this court, it seems to us that it is our duty, in remanding the case, to direct the circuit court only to rectify the error into which it has inadvertently fallen, and that we cannot, without an abuse of a proper discretion, give leave to open the case and make further preparation on the merits.

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Wherefore, the decree is reversed and the cause remanded, with instructions to render a decree modified and rectified according to this opinion.

*Huggin and Monroe*, for plaintiff; *Richardson*, for defendant.

*The plaintiff filed the following petition for a re-hearing.*

It is with the most unfeigned reluctance, influenced by feelings and convictions which he is unable to resist, that the plaintiff in error feels himself compelled to solicit of the court a re-hearing of this cause, and to solicit most earnestly their attention to, and patient investigation of the questions which present themselves in the record. And your petitioner, in urging this matter on the attention of the court, will be acquitted by them of pertinacious perseverance in pursuit of that which is even of doubtful right. He cannot but persuade himself, not only from his personal knowledge, and thorough conviction of the gross injustice done him, through the instrumentality of a court of justice, by the abuse of its process and jurisdiction, by an artful fabrication of a fictitious case, by the conjuring up ostensible and colorable demands, which, as far as they ever had real existence, have been long since satisfied; of which the excluded pleadings and depositions in the cause, furnish to all, who will peruse them, the most conclusive proofs.

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That love of justice and desire for its attainment, by this ultimate decree, in every case, which should characterise the upright judge, should not only prompt a full and deliberate investigation of the real and true merits of every case, but incite the most astute and sagacious exercise of his keenest perceptions, in discovering the just and efficacious means for its attainment; and in the pursuit of this

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purpose, in the present case, where a decree most flagrantly unjust had been procured, *ex parte*, on the representations of the plaintiff, unaccompanied by sufficient vouchers, and destitute of the proper proofs, in the absence of the defendant and his evidence; without appearance and without defence, the chancellor will enquire and ascertain to his entire satisfaction, that he has complete and unquestioned jurisdiction of the case, before he proceeds to execute it. To the exercise of this jurisdiction on the part of the court of equity, holden for the county of Gallatin, in a case like the present, for the recovery of pecuniary demands purely personal and of a character entirely legal, for monies pretended to have been expended by the complainant for the defendant's benefit, there are strong objections. The remedy, by action at law, to be commenced in the county in which the defendant might be found and served with legal process, and in which he has a right to the inestimable benefit of a jury trial, is clearly and peculiarly appropriate; and although the jurisdictions of causes, personal, like the present, may be sometimes transferred to the equitable jurisdiction, it must be for some peculiar and sufficient cause other than that of the whim or caprice of the complaining party, or his desire to procure, by the artifice of thus transferring jurisdiction, the means of perpetuating, by the abuse of process and perversion of the equitable jurisdiction, the most flagrant injustice on his adversary, as in the present case.

The right of enforcing an equitable lien on real estate, in case of the personal irresponsibility of an absent or insolvent debtor, may operate this transfer of jurisdiction. And if, in the present case, the existence of such *lien* had been manifestly shewn, and a desire and prayer for its enforcement had been clearly indicated by the complainant in his bill, the jurisdiction of the chancellor would not have been questioned. But the existence of such equitable *lien* on the undivided moiety of the defendant, to enforce the payment of improvements, not made on the premises by the complainant, of which he was not the owner, of improvements made by another, under an adverse conflicting claim, is not admitted,

nor can its existence, as he believes, be established in principle or authority. The improvements in question were made by Buckhannon under an adverse claim. The conflicting titles had been litigated in the federal court. The federal tribunals had refused to execute the occupying claimant law of 1812 of this commonwealth, by which this lien was first created, on the ground of its confliction with the compact. The complainant, notwithstanding these decisions, of which this court must take judicial notice, without the authority or privity of the defendant, his co-tenant, had consented, as appears by his own exhibits, composing parts of his bill, to appoint commissioners for the assessment of these improvements; and when they are thus assessed, without consulting with, or regarding the interest of his co-tenant, and against his will, as security, (not as principal) for Brackenridge, executes his bond for the payment of the assessed amount, an enormous sum: and upon an alleged understanding (not express or positive agreement with the defendant) when he entered on the portion of land, on which these improvements were situated, that he would pay for them. He has taken a decree for the whole estimated value of these improvements (which are proved to confer no additional value on the land) with an arrear of interest for many years, amounting almost to the full present value of the land and improvements altogether. Is not this flagrantly and outrageously unjust? And does it deserve, or can it receive, the approving sanction of the chancellor or upright judges?

The opinion of the court, in the present case, assumes as a position, requiring illustration neither from argument or authority, that the complainant had a lien in the defendant's moiety of the land, of which partition is sought for the estimated value of the improvements made by Buckhannon under the adverse claim; and in the supposed existence of this lien, the jurisdiction of the circuit court of Gallatin, as a court of equity, to decree the payment thereof. The fact on which he predicates his right to them, is the payment by him of the amount to the occupying claimant, in consequence of a bond executed by him, as the security of the lessor of the plaintiff in

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ejectment, in the absence of Talbot, without his privity or consent, as is admitted in his bill, and was the result of a previous order of the court entered by the consent of the complainant without the judicial action of the court, and is his voluntary act, without legal coercion, which would of itself confer no right on him or impose responsibility for the payment of the whole or any part on the defendant, especially as it was well known that the federal tribunals refused to execute the provisions of the occupying claimant acts on account of their incompatibility with the compact. Can a payment thus made confer on the complainant a *lien* upon the defendant's moiety for the amount, upon the allegation, that the defendant had entered on the portion thus improved, upon an understanding that he should pay to the complainant the amount? The negative of this proposition can be maintained upon principle, and by authority of the judicial decisions of this court, to which the earnest attention of your honors is respectfully solicited.—The case of Delay and Hayden, reported in *Littell's Select Cases*, page 277. It was a bill filed by the occupying claimant against the successful claimant in ejectment, himself insolvent, who had sold and conveyed the land to Hayden, the defendant, to enforce a lien claimed by the complainant upon the land from which he was about to be evicted; and upon full and mature deliberation, it was decided that no such lien existed, neither on principles of law or equity, and that none was conferred by the operation or true construction of the act of 1797, in virtue of which the improvements had been assessed. The Chief Justice, in the opinion delivered in that case, thus defines the right of "lien." "A lien is a special right which one has in that of which another has the general property; and to the extent of the lien it is an abridgement of the dominion which the latter has in the thing. From its nature, therefore, a lien can only be created by the consent of the party who has the general property, or by the operation of some positive rule." Tested by this just definition of the rule thus correctly given, what are the complainant's pretensions to such lien, and to its enforcement in

the present case? The circuit court of Gallatin had jurisdiction, it is conceded, by bill in equity, to enforce partition of the land, held in common between the parties within the limits of its jurisdiction. As incident to that partition, the court has power, in the effectuation of this purpose, to regard the improvements made by the labor of, or at the expense of the respective parties; and equality requires that, in making such partition, the improvements made by each shall be preserved and assigned to each, or either, in such partition, and so far, and so far only, the improvements on such land, of which such partition is sought, is incident to the power or jurisdiction to make partition. The jurisdiction to make partition between persons holding jointly, appertained to the common law tribunals; and when exercised by the chancery court, by an extension of their original jurisdiction to the subject, should be exercised in analogy to, and in conformity with, the principles that governed at common law, in the appropriate writ. Were this a writ of *partitio facienda*, then could it be plausibly pretended that in making such partition, the complainant here, could set up and urge as an incident to such partition, the payment of a sum claimed as the assessed value of improvements, made on the premises, held in common by another party holding under adverse title, in virtue of some occupying claimant law, which the complainant alleged he had paid to such occupying claimant; and would not such pretension be justly scouted? The partition, in the present case, is sought by bill in equity in the county in which the land is situate, and to the effectuation of this object, the powers of the circuit court of Gallatin are competent. But the pecuniary demand for the assessed value of improvements, which had been placed on the premises by another under an adverse title, and which the complainant alleges he had discharged to such occupying tenant, from his own showing constituted a mere personal demand against the defendant, the jurisdiction for the enforcement of which are the tribunals of common law, and at the proper forum of the defendant's residence. The attempt, in the present case, to drag

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them before the chancellor, by bill in equity, before an alien tribunal, remote from his place of residence, is unauthorized by any principle of equitable jurisdiction, was a mere feint and artifice to embarrass and surprise the adverse party under the disguise of an effort to obtain partition, which had been effected many years before to the entire satisfaction of the parties, on terms too fair and equitable. By this artifice, reposing in the careless and confiding temper of his adversary, who, believing the suit to be merely a friendly one to procure mutual release of titles, omitted to appear and enter the defence, in due season, to those unjust demands; and was thus ensnared by the trap thus artfully set for his destruction. And will this, the appellate equitable tribunal of the country, stamp with its sanction and approbation a decree thus obtained, stained with the most flagrant injustice, and ruinous in its effects on the interests of your petitioner?

To progress with the enquiry. Had Buckhannon, the occupying claimant himself at the time of filing the complainant's bill, any lien upon the interest of your petitioner in the land, for the assessed value of his improvements? The answer must be unequivocally in the negative. It is true, that a lien is given by the act of 1812 in favor of the occupying claimant, but, as before remarked, that act had been expressly repudiated by the federal courts as unconstitutional. The ejectment was there pending, and there decided against him; and if no lien existed there, how could such a one be created in the state tribunals? And if no claim for payment, much less lien for the enforcement of such payment, existed in behalf of the occupying claimant, how could the voluntary payment, on the part of the complainant, of his own mere caprice, and in his own wrong, confer on him, not only a right to the payment of the amount on the part of this defendant, but a lien on his moiety of the land for the whole assessed value of such improvements? Upon the simple and loose allegation in the bill, that the defendant entered on that part of the land on which the improvements had been made, upon an *understanding* that he would pay the amount of such improvement. And shall

this *understanding*, loose and vaguely stated, false as it is in fact, and unsupported by one particle of evidence, contradicted and refuted by all the testimony in the cause, be the foundation of a decree so destitute of all foundation in right and justice? And this upon the intimation, thrown out in the opinion, that the payment of the pecuniary demands, set up in the complainant's bill, were all *incident* to the partition. They are indeed fearful and tremendous incidents, to which the pretence for partition was made the mere stalking horse to misguide and delude the defendant.

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These considerations, hastily and imperfectly presented, and many others which might be added in illustration of them, did the occasion require or permit them, it is confidently believed will entitle your petitioner to a candid review of the opinion delivered herein by this honorable court, and that a re-argument, on full preparation of the questions involved in the decision, will ultimate in the vindication of the ground he has ventured to assume in contradiction, it is true, but with all due respect to the court's opinion.

The other items of the decree, under revision, are of minor consequence, and will form the subject of but brief remarks. The claim to the payment of \$82 12 1-2 cents, as a balance due from the defendant on account of his proportion of the the purchase money of his moiety of the land, rests upon the complainant's allegation, that that sum is due, and is to be tested by the exhibit to which he referred, which constitutes an essential part of his bill. That exhibit is the agreement on the part of the complainant with Waller, for the purchase of the land, with that between the complainant and this defendant, by which the latter, as an equal partner, was admitted into a participation of the purchase as an equal partner. No time being fixed in his agreement with the complainant for the payment of his moiety of the purchase money—the agreement stating that a part of it only was paid down at the time of executing the agreement, it is fairly inferrible, and is a just construction of the agreement, that the payments were to be made to the complainant at the periods



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when he stood bound, by his contract of purchase, to make the payments to Waller. The complainant having resorted to a court of equity to enforce those payments in that court, calculations of interest on the sum due, as well as the payments by the defendant, should be made on equitable principles; and in a calculation made in conformity with these principles, it allowing interest on the balance of the principal sum due in favor of the complainant until the first payment was made as endorsed on the instrument, and allowing interest in favor of the defendant for prompt payment made by him to the complainant, as appears from the same endorsements, at periods long before the two last payments became due to Waller, which was not until the 1st January, 1818, for the one, and the 1st January, 1819, for the other, and last payment, which will be apparent from a comparison of the payments endorsed on the defendant's contract by the complainant himself, and the date of the complainant's bond to Buckhannon for the payments of his improvements; the date of that bond and the fact of its execution fixing the time when the plaintiff in ejectment had a right to the possession of the premises under the provisions of the occupying claimant law. An adjustment of these payments on equitable principles, then, will result in favor of the defendant, leaving a balance in his favor of some \$70 dollars, if he is correct in his calculations. Unless, therefore, the simple naked allegation in the complainant's bill, that the defendant is indebted to him in the sum of \$82 12 1-2, uncorroborated by, but contradicted by his own exhibits, is to give sanction to this unfounded claim; and if the construction which the defendant has assigned to the agreement, is the correct one, the decree for the payment of this sum, with a long arrear of interest, is unjust, and should be reversed.

The remaining item of the complainant's pecuniary demand, is founded on an allegation that he had paid some \$40 odd, in taxes, on the land in question. If true, though he has filed no exhibit, as he promises in his bill to do in its corroboration, surely has no connection with the partition sought for, and can form no incident consequent on such partition, and,

as it should seem to your petitioner, can form no colorable pretence for calling in the aid of a court of equity of a different county, and distant from the residence of the defendant, to enforce the payment of such demand. But there is presented in the face of the decree an evidence of injustice in the sum decreed the complainant on account of a sum alleged to have been paid by him for improvements, assessed in favor of Buckhannon, so flagrant and so striking, that instead of meriting the sanction of this court, deserves, and should receive its severest animadversion as a glaring imposition on the court. The complainant's bill itself states the amount of improvements adjudged in favor of Buckhannon, deducting the rents assessed against him in conformity with the provisions of the occupying claimant law, to be, as it truly was, the sum of \$1080, for which he alleges he gave his bond as the security of Breckenridge, the plaintiff in ejectment, and which sum *alone*, and no more, he alleges he discharged. But he unblushingly pretends to insinuate in his bill, that the one half the sum, \$390, deducted from the assessed value of the improvements, assessed against Buckhannon, should be paid to him, the complainant, Samuel Todd, because the defendant enjoyed the occupation of the premises on his entry thereon, after the surrender of the possession by the occupant.

The shameless and unfounded character of this absurd pretension need only be hinted at. To enlarge upon a pretension so preposterous, would be an abuse of time and the patience of the court. It seems rather insinuated, than openly avowed as the foundation of a demand in the complainant's bill, and it is disguised, in drawing the decree of the circuit court, by confounding or adding it to the sum of \$1080, the value of the improvements, really adjudged in favor of Buckhannon, making an aggregate sum of \$1385, for which a decree is entered against your petitioner in the name of "improvements," and is there endeavored to be sheltered from the castigation which is merited by the gross injustice of the claim. By this artifice, has this abuse of chancery jurisdiction been not only concealed from

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the circuit court, but it has been permitted to escape the vigilant inspection of your honors in the revision of this decree.

This sum of \$1335, thus made up, being referred to in the opinion as the sum found due, and paid to Buckhannon, by the complainant, in virtue of the occupying claimant law. But, to return to the objections to the jurisdiction of the court of equity, sitting for the county of Gallatin, to decree the sums demanded by the complainant's bill, which are not yet half exhausted. The claims set up, are all of them personal and pecuniary, forming properly the subject of an action on the implied assumption at common law. There is the certain and appropriate as well as ample remedy. To transfer these causes of action to another tribunal, a court of equity, remote from the defendant's place of residence, to be just and appropriate, a just cause and motive on the part of the complainant, should be alleged and shewn. To make out a case for that equity jurisdiction, the complainant, by his allegations, if he have a lien upon the defendant's moiety of the land in question, the cause and foundation of such lien must be asserted by his bill, it being essential to the conferring jurisdiction on the court, and its enforcement prayed for in appropriate terms. The only cause for having recourse to this court for the enforcement of the lien, his inability to enforce the payment of his demand by proceeding at law against the person, the insolvency of the party, or his absence from the country or his evasion of the service of legal process, or some such cause. And only upon a case thus made out, invoking the aid of a court of equity, the interposition of its extraordinary aid might be deemed essential to secure the justice sought for, could the equity jurisdiction of the chancellor have been legitimately exercised? Not by a general decree, as in the present case, but by a decree in rem. by sale of the land on which the complainant's claim, as well as the jurisdiction of the court attached. And such, it is believed, has been the invariable course of practice in the courts of equity, in which liens founded not on contract, as deeds of trust or mortgages, but only in equitable

rules or implications, have been enforced. Much more might be said on this question, but I forbear to urge them on the patience of the court. To their own enlightened minds and mature reflections, are referred for farther illustrations of the injustice and impolicy of such restraints on the exercise of the chancery power by the court of original jurisdiction; of the baleful and deleterious consequences of which, this case affords for your petitioner a most unhappy example.

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But the attitude which the case assumes, when the defendant appeared for the first time and moved to open the decrees which had been pronounced against him on the bill taken for confessed, and the character of the decree, which has been assigned to them by your honors in this opinion, are matters which your petitioner hopes, as he sincerely thinks they deserve, will engage the serious meditation of the court, as they are of deep concern, not only to himself, but to the interest of justice, and of all suitors in our courts of equity.

By this opinion, the decree which had been pronounced at a former term for the payment of definite sums of money, is deemed and held a *final* one, and the circuit court, of consequence, inhibited the power to open such decree, for any cause, at any term subsequent to that of its rendition. Although another part of the *decree*, evidently *interlocutory*, directing commissioners to make partition of the land, had not been acted on by a report of the commissioners, or *final decree* thereon for partition and mutual release of title.

That the branch of this decree, which directed a *partition*, was *interlocutory*, if there is a distinction between decrees *interlocutory* and *final*, seems not only to be admitted by the opinion, but seems too clear to admit of argument or illustration. What shall be deemed a decree *final* in a cause ought surely not to be a matter of difficult solution. If we take the meaning of the term, there is surely not one in the language more emphatic.

A *final* decree must be that which forever puts an entire end, by closing the door of justice on the parties, suitors in that court.

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If we refer to the practice of the English courts of equity, we find this meaning assigned to such decree, in conformity with which, when such final decree is pronounced as that referred to which ends the above cause, and every part of it, the decree is enrolled in parchment, and then, and not till then, is placed beyond the reach or discretion of the chancellor who pronounced it; who has power at all periods previous to such enrolment, on proper ground made out, to open or modify such decree, or to grant a re-hearing of the cause. Decrees, then, are not final that do not put an entire end and finish of the cause before the court of original jurisdiction, whether they consist of orders in the progressing or preparing of the cause, by successive steps, investigating or illustrating the facts and principles finally to be matured and settled, or *interlocutory decrees* or orders, whether such intermediate orders or decrees settle all or only part of the facts and principles involved in the final decision, or determine one or all the branches of the dispute or controversy; whether they decree the payment of sums of money either certainly or definitively, as in the present case; although they may be definite as to the amount of sums, or things to be paid or done by one or the other party, are not and do not constitute the final decree in the cause. Nor is this ever made, till, by disposing of the whole cause and every branch of it, even to the costs, the doors of that tribunal becomes forever closed; and the parties are left to their bill of review, or an appeal to the tribunal having a reviving power. Were not this so, but as the opinion of the court seems to indicate, the decree for the payment of definite sums of money, as well as that for a partition by commissioners who had not yet acted or reported, were final, there might and would be in this and many other causes, not one, but two or more final decrees in the same cause, one final and the others still more final, *ad infinitum*, until confusion, worse confounded, would ensue; and it would be difficult to determine when the parties had got to the final termination of any cause. But if, as indeed it appears to your petitioner self-evident, there can be but one final decree in the same cause by the court

of original jurisdiction, it is that decree, and that only, which, having settled not one, but all the matters in contest between the parties, closes the door of litigation of that tribunal, and puts the parties to their bill of review or a revision of the case before the appellate jurisdiction; and for the correctness of this definition, your petitioner refers your honors to Hinde's and other books of chancery practice, which he believes will bear him out in the positions he has assumed. And, surely, if he is supported by the English adjudications and the practice of the courts of equity in this country, the principles which ought to govern in such court will be better effectuated, and the substantial ends of justice be better and more certainly attained, by the liberal application of an enlightened and just discretion exercised over parties, by giving them ample time for the full preparation of their causes, and thereby attaining the ultimate end and purpose of all earthly tribunals, equal and substantial justice.

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In support of the power of the chancellor to set aside, or modify his decrees, on motion, or by petition, and the stage at which such decree becomes irrevocable by the court of original jurisdiction, the court are referred to Hinde's Practice in Chancery, page 442, 445; II Atkins, 403. II Vezey, 577.

But authority still more conclusive on this question, will be found in the case of Kemp vs. Squire, I Vezey, 205.

It was a petition to have the enrolment of a decree set aside because of the great neglect of the solicitors employed in the cause; and on solemn argument, and the citation of several cases, which are fully stated in the argument, the decree, although final and enrolled, was set aside. The chancellor, in delivering his opinion, employing this emphatic language: "No irregularity or misbehavior of the delendant to induce the court to set aside this enrolment; but any court of justice will incline, as far as in its power, to open what is concluded, that the clients may come before the court, and that the plaintiff may not be precluded from entering thereon, and have justice done." And in a subsequent page of the same opinion, he says; "Compare this

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to the proceedings at common law, when a judgment is signed, by default, for want of a plea or any other default, although the plaintiff in the cause is strictly regular, yet will the court set aside that judgment, though they will vary the circumstances and terms on the defendant, according to the nature of the case."

The attention of the court is most earnestly solicited to an attentive perusal of this case, as one admirably calculated to evince the liberal indulgence of the British chancellor in effecting the purpose for which that liberal tribunal was instituted—the attainment of the ultimate justice of all cases in litigation before them, by extending the time and opportunity for full and ample preparation and investigation of the entire merits of a cause before the door of justice is finally closed upon them. A final decree enrolled on parchment in all the solemn forms of that court, having been opened and set aside by this enlightened chancellor; for which it will appear he has the authority not only of former chancellors, but of the House of Lords.

Wherefore, and especially for the flagrant error in the face of the decree itself, in relation to the sum decreed on account of the monies paid Buckhannon for his improvements, against your petitioner, he prays that a re-hearing of the cause may be awarded him.

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*Per curiam.* A re-hearing is granted on one point only—that is, whether Todd is entitled to a decree for one half of the rent which was set off against Buckhannon's improvements.

And after a re-argument of the cause, Chief Justice Robertson delivered the Opinion of the Court as follows :—

Upon re-consideration, we are inclined to the opinion, that, according to a proper construction of the allegations of the bill, as to the contract for the improvements and partition, Todd is entitled to a decree (for improvements) for only so much as he

actually paid Buckhannon, that is, \$1080, and interest thereon. It seems that the moiety of the rents was waived by that contract, as now construed.

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Wherefore, the opinion and mandate are hereby corrected to that extent; but, in other respects, must remain unaltered.

## McDaniel vs. Wright.

CHANCERY.

Appeal from the Nelson Circuit; BOOKER, Judge.

CASE 147.

*Rescission of contracts. Principal and agent. Fraud. Judicial knowledge.*

Chief Justice ROBERTSON, delivered the opinion of the Court.

October 9.

THE appellant, Redman McDaniel, filed his bill in chancery against the appellee, Richard Wright, praying for a rescission of a contract whereby he had sold to Wright, for \$100, his interest as one of the heirs of Peter Becroft, who had died in 1825, childless and intestate. On the hearing upon bill, answer, and depositions, the circuit court dismissed the bill absolutely.

It seems that Rachel McDaniel, who died before 1825, was a sister of the decedent, Peter Becroft, and would have been entitled, if she had survived him, to one seventh part of his estate, or about \$1500, the estate having amounted to about \$10,500; that she had had ten children, four of whom had died prior to the death of Peter Becroft, one childless and three leaving issue; that of the six survivors, the appellant and the wife of the appellee's were two; that, hearing of Becroft's death, the appellant and another of the six survivors, determined to ascertain the extent of their interests, and agreed with the appellee that if he would go to Frederick county, in Maryland, (where the decedent had lived and died) and attend to their claims, they would reimburse a just proportion of his expenses and pay him a reasonable sum for his services—and accordingly gave him authority to collect whatever might be due to them; that he went to Maryland twice, but failed each time to collect any thing, because, on his first visit, the estate was not ready for distribu-



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tion, and on his second visit his authority was deemed imperfect; that after his return the second time, he bought the claim of the appellant for \$100, and having, in the mean time, obtained a sufficient authority from all the heirs of Rachel McDaniel, he went a third time to Maryland, and then received \$1400 as the aggregate amount of the joint interest of all who were entitled to any thing, as representatives of Rachael McDaniel.

The bill charges that the appellant had supposed that the children of the three who had died prior to Becroft's death, were entitled, as well as the six survivors, to portions of his estate, and that, therefore, the appellant's interest was only one ninth part of the seventh to which his mother would have been entitled; that the appellee had ascertained, on his first visit to Maryland, that by the law of that state, the grand children of Rachel McDaniel were entitled to nothing, but that her six surviving children were entitled to the whole of her interest in Becroft's estate, but that he not only concealed the fact, but falsely represented to the appellant that his interest was only one ninth instead of one sixth part.

The answer denies fraud in suggestion or suppression, and alleges that, on his second visit, a lawyer told the appellee that the six survivors were alone entitled, and that a judge told him Rachel McDaniel's interest was, according to the law of Maryland, divisible into nine shares, and that he himself did not know which of his counsellors were right.

Contracts between agents and their principles, as between others, standing in confidential relations, should be jealously scrutinised by the chancellor, and slight circumstances of inequality, surprise, or hardship, may be sufficient to vacate them even, sometimes, without proof of actual fraud. In this case it was the duty of the appellee, as an honest man and a faithful agent, to communicate to the appellant, all he knew or had even heard, which might affect the value or extent of his interest; and if he failed to do so, and in consequence of that failure, (even without any misrepresentation) obtained his interest for less than would have been de-

Contracts between agents and their principles, as between others, standing in confidential relations, should be jealously scrutinised by the chancellor, and slight circumstances of inequality, surprise, or hardship may

manded on a full view of all the facts, honestly and truly disclosed, it would be right to rescind the contract.

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It is true that there is but an inconsiderable difference between the appellant's interest at its maximum estimate, and the \$100 given for it, when added to the amount to which the appellee would seem to be entitled for expenses and service, if the contract be rescinded. That circumstance should not, however, operate decisively, if otherwise it would be clearly right to decree a rescission.

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fraud.

But as the case was presented to the circuit judge, he ought not to have decreed a rescission. It does not sufficiently appear that the appellant was entitled to a sixth, or to more than he supposed he was, viz. one ninth part. The answer is silent on that subject, and there is no proof. There is nothing in this record to show what the law of Maryland is; and the law may even there be unsettled or uncertain, and a mere matter of speculation about which jurists may entertain opposite opinions. It is not a matter which should be presumed to have been certainly in the knowledge of the appellee. It appears that the appellee has stated to the appellant, and to some others, since he collected the \$1400, that the fund due to Mrs. McDaniel's children was distributable into nine shares, by the law of Maryland, and that he has said to some of those claiming as heirs of the three children who died before the death of Becroft, that the law distributed the fund into six parts only, and that consequently, none but the six surviving children of Mrs. McDaniel were entitled to any thing. But all this, in its most unfavorable aspect, does not prove what the law is, nor show that the appellant is entitled to one sixth part, or that the heirs of the three deceased children of Mrs. McDaniel are not entitled, *per stirpes*, to three parts out of nine. It seems that the appellee had authority from the claimants of nine shares, to collect whatever was due to any and to all of them; and it does not appear that he collected for six only, but simply that he received \$1400 for one entire seventh part, to which the children of Mrs. McDaniel were entitled, without having had it ascertained judicial-

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This court does not judicially know how the laws of Maryland distribute decedent's estate.

ly, or otherwise, that the amount so collected was distributable into nine or only six parts.

Not knowing, judicially, what the law of Maryland is or was, this court cannot decide that the appellant is entitled to as much as one sixth or to more than one ninth part of the one seventh part, to which his mother, if living, would be entitled.

Wherefore, the decree must be affirmed.

C. A. Wickliffe, for appellant.

CASE.

### Gray vs. Combs.

Case 118.

Error to the Logan Circuit; BRODNAX, Judge.

*Spring-guns. Defence of person and property, Prevention of crime. Felony. Slaves.*

October 9.

Judge NICHOLAS delivered the opinion of the court.

To an action on the case, brought by Gray against Combs, for killing a negro man slave, the latter plead in substance, that as clerk and store keeper, he had the care and custody of a brick ware-house, containing a variety of goods of great value, that before the killing said slave, some person having been in the habit of entering said ware-house, at night, and stealing goods therefrom, though well secured with good doors and locks, and the defendant not being able to apprehend said thief, for the protection of said property and prevention of such stealing, set up a loaded gun on the inside of the house, with a string tied to the trigger; that said slave, in the dead hour of the night, with the intent of stealing said goods, broke and entered said house, pushed against said string, and thereby caused the gun to go off and himself to be shot and killed, &c. To this defence the plaintiff demurred, and the court having overruled the demurrer and given judgment for the defendant, the plaintiff prosecutes this writ of error.

For the defendant, it is contended, that his act is only to be viewed in this suit, with an eye to the civil code, and the killing of the slave to be treated no otherwise than the killing of an ox under similar

circumstances, and that if he has infringed any part of the criminal code, he must be left to a criminal prosecution for his punishment. This cannot be. If what he has done is illegal, he is none the less responsible to remunerate the master for the value of the slave, because he may also be responsible to the state for taking the life of a human being. His act, whether viewed civilly or criminally, must be adjudged of in all its consequences, according to its legality, and it is perfectly immaterial whether the rule for testing its legality be found in the civil or the penal code. But conceding the distinction attempted, we should, by no means, be prepared to concede the consequence deduced from it. A similar process of reasoning would justify the destruction of human life, in the prevention of any mere trespass, by the use of like indirection in the mode of defence.

For the plaintiff it is contended, first, that the use of means calculated to produce death, by whatever indirection they may have been used, are as obnoxious to the censure of the law, and render the user as culpable, as if they had been used directly and immediately by himself.

Second, That the theft or robbery attempted by the slave, if perpetrated, would have been no felony, but only a misdemeanor, punishable by stripes alone.

Third, That the law does not allow the taking of human life, except for the necessary prevention of a crime, which, if committed, would be punished by the law, with death.

The first of these propositions may well be conceded. The second is undeniably correct. By the 19th section of an act of 1802, II. Dig. 1160, it is declared that a slave convicted of any other offence than murder, arson, rape, robbery from the person, and burglary, shall be sentenced to receive any number of lashes not exceeding thirty-nine. The third section of an act of 1806, Dig. 1161, declares in substance, that any offence in a slave, for which stripes are imposed as the only punishment, shall be deemed a misdemeanor only.

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In support of the third proposition, we are referred to the language used by judge Blackstone on this subject, IV Com. 181 After citing the instances in which the law justifies killing to prevent the perpetration of various crimes, he alludes to another which he makes no doubt may be equally resisted by the death of the unnatural aggressor. "For, says he, the one uniform principle that runs through our own and all other laws, seems to be this, that where a crime which in itself is capital, is endeavored to be committed by force, it is lawful to repel that force, by the death of the party attempting." "The law of England, like that of every other well regulated community, is too tender of the public peace, too careful of the lives of the subjects, to suffer, with impunity, any crime to be prevented by death, unless the same, if committed, would also be punished by death." If the law be as thus laid down, it is difficult, if not impossible to escape the conclusion, that the act of the defendant in this case, was illegal, and he consequently responsible for the value of the slave. For as the crime would not, if committed, have been punished with death, it would, according to this rule, have been unlawful to kill him.

But we cannot accede to the correctness of this rule, no authority is cited in support of it, and we believe none, sufficient to sustain it, can be found. Its recognition, would singularly and essentially curtail the right of self defence in this state, as heretofore supposed to be and long acted upon, with the approbation of all the virtue and intelligence of the community. In such a community, where the rights of self defence are so dearly cherished and so well maintained by the sentiments of our population, it would not merely be with reluctance, but extreme regret that we should acknowledge ourselves compelled to adopt or follow so restricted a rule. The result would be, in the present state of our criminal code, that neither highway robbery, rape, or a variety of other equally atrocious crimes could be lawfully prevented by the death of the aggressor. Indeed, we apprehend that it would be as futile, as unwise, for even the legislature to ad-

The rule, as laid down by Sir William Blackstone, that the law will not "suffer any crime to be prevented by death, unless the same, if committed, would be punished by death," is incorrect. In most civilized countries the authorized extent of resistance in the necessary defence of the

nounce such a rule. Public sentiment is so decidedly and unalterably opposed to it, that it would be vain to attempt its enforcement. In vain would the way-farer be directed to surrender his horse and his purse to a robber, rather than protect them by the death of the assailant. In vain would juries be called on to punish with the gallows, a necessary defence of female chastity. We fear not the imputation of temerity, in hazarding the opinion, that Blackstone has misconceived both the rule and the reason of it. In every civilized community except where there prevails such a draconic code as exists in England, the authorized extent of resistance in the necessary defence of the person or property against the perpetration of crimes, must greatly exceed the amount of punishment prescribed by law for their perpetration. The final sanctions of all wise codes are framed in a spirit of true clemency, and with a view rather to deter from the commission and repetition of crime, than thoroughly to avenge an injury done. Much of the punishment is left to the conscience of the criminal, and to the ultimate avenger of all human crime. On the other hand, the right of necessary defence, in the protection of a man's person or property, is derived to him from the law of nature, and should never be unnecessarily restrained by municipal regulation. However proper it may be for every well ordered community to be tender of the public peace, and careful of the lives of its citizens, there can be neither policy or propriety in extending this tenderness and care so far as to protect the robber, the burglar and the nocturnal thief, by an unnecessary restraint of the honest citizen's natural right of self defence. Sir Matthew Hale, in speaking on this subject, says, "the right of self defence in these cases is founded in the law of nature, and is not, nor can be superceded by the law of society. Before societies were formed, the right of self defence resided in individuals, and since, in cases of necessity, individuals incorporated into society, cannot resort for protection to the law of society, that law with great propriety and strict justice considereth them as still, in that instance, under the protection of the law of nature."

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person or property against the perpetration of crimes must greatly exceed the amount of punishment prescribed by law for their perpetration.

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Indeed Blackstone himself, IV Com. 180, holds this language, "Such homicide as is committed for the prevention of any forcible and atrocious crime, is justifiable by the law of nature, and also by the law of England, as it stood so early as the time of Bracton, and as it is since declared in statute, XXIV Hen 8 c. 5." He then cites the Jewish law, which punishes no theft with death, yet justifies homicide in cases of nocturnal house breaking. "If a thief be found breaking up and he be smitten that he die, no blood shall be shed for him, but if the sun be risen there shall blood be shed for him." He then cites the law of Athens, where if any theft was committed by night, it was lawful to kill the criminal if taken in the fact, and the transcription of the same law into the Roman twelve tables, and concludes thus, "which amounts very nearly to the same, as is permitted by our own constitutions." Without attempting to reconcile this language with that first quoted, an apology may be found for the latter, in the fact that almost every forcible and atrocious crime is punished with death, by the laws of England, so that the rule as laid down by Blackstone may there be strictly correct in its letter, though not in its spirit or for the reason assigned by him.

We have not had access to Bracton, to see the citation made from him by Blackstone, but have met with the following quotation from him in a note to Hale, 488. *Qui latronem occiderit, nocturnum vel diurnum, non tenetur. si aliter periculum evadere non possit tenetur tamen si possit.*

It is evident from the language used by Hale, P. C. 484 to 489, that he placed justifiable homicide upon the ground of the prevention of a felony and not the prevention of a crime punished by death. After stating a case of justifiable homicide in defence of a third person, he says, "and the reason seems to be because every man is bound to use all possible lawful means to prevent a felony." Again—"In case of a felony attempted, as well as of a felony committed, every man is thus far an officer, that at least in killing the attempter in case of necessity, puts him in the condition of *se defendendo*, in defending his neighbor."—"now concerning felonies, as there

is a difference between them and trespasses, so there is a difference among themselves, in relation to the point of *se defendendo*. If a man come to take my goods as a trespasser, I may justify the beating him in defence of my goods, but if I kill him it is manslaughter. But if a man come to rob me or take my goods as a *felon*, and in resisting I kill him, it is *me defendendo* at least, and in some cases not so much.”

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He further says that the statute, XXIV Hen. 8 c 5, was but declarative of the law as it stood before, and to remove a doubt, and puts the killing a robber in or near a highway, &c. in the same condition with one that intends to rob or murder in the dwelling house, and exempts both from forfeiture.

Foster, p. 273, says, “a party may repel force by force, in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoureth, by violence or surprise, to commit a known *felony* on either.”

From these authorities, and what we deem to be the reason of the law, it would seem, that the right of killing to prevent the perpetration of crime, depends more upon the character of the crime, and the time and manner of its attempted perpetration, than upon the degree of punishment attached to it by law, or upon the fact of its being designated in the penal code as a felony or not. A name can neither add to, or detract from, the moral qualities of a crime, and in the eye of reason and justice, the intrinsic nature of the offence, together with the time and manner of its attempted commission, must ever test the legality of the means to be resorted to for its prevention. It is not absolutely necessary, however, for the purposes of this case, to do more than place it on the ground of the prevention of a felony. For, though the robbery attempted in this case would only have been a misdemeanor in a slave, yet, in a white person, it would have been a felony; and, therefore, though according to strict law, it may not have been a justifiable means of prevention as against a slave, such being known to be the character of the thief, yet, in the absence of such know-



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ledge, we would suppose a resort to such means justifiable, as is permitted against the general, more numerous and worthier class of the community, and the circumstance of the calamity lighting upon one of the other class, is to be taken as misadventure. Whatever cavils may be entertained against such a course of reasoning, we should feel little hesitation in resorting to it, if necessary, to render slaves liable to all the same perils that whites incur in nocturnal depredations, and justifying as against them the same means of defence as against whites. The crime is of the same moral die in each, and neither justice or policy would allow the inculcation of a resort to the necessary means of prevention against its perpetration by one, and not by the other, merely from the circumstance that the offence when committed by one, is designated in our code by a different name, than when committed by the other.

The right of self defence is not derived from society, but is a right which every individual brings with him into society, and retains in society, except so far as the laws of society have curtailed it.

The right of punishing crimes, and the infraction of individual rights, may well be presumed to be surrendered by every man to the whole community, when he enters into civil society. The well being of society requires it. Not so, however, as to the right of defence. Its possession and exercise are still necessary to individual security, and not incompatible with the public good. It is true society may curtail this right, and no doubt does restrain its exercise in many important particulars. But it is emphatically a right brought by the individual with him into society, and not derived from it. He consequently retains the plenary right, except so far as it has been restrained by the laws of society. The extent of the right of defence is necessarily undefined by the law of nature. Its only limit is necessity. "That law," says Rutherford, "allows us to defend our persons or property, and such a general allowance implies, that no particular means of defence are prescribed to us. Whatever means are necessary, must be lawful, because it would be absurd to suppose that the law of nature allows of defence, and yet forbids us, at the same time, to do what is necessary for this purpose. It follows, that he who attempts to injure us, gives us an indefinite right over his person, or a right to make use

of such means to prevent the injury, as his behavior and our situation make necessary." He also says—"the right of defending our goods is an indefinite one, and that we are not naturally debarred from proceeding to extremities in their defence, where the obstinate injustice of those who would deprive us of them renders this necessary." The same author also vindicates such defence of our goods as may end in the death of him who attempts to take them from us, as consistent not merely with justice, but with benevolence also. This, however, is a question for casuists. It is one with which we have little to do. Our inquiry is limited to ascertaining, whether our municipal code has restrained the natural right of defence so far as to inhibit what the defendant has done in this case. We cannot find that it has. So far as we know, there has been no authoritative precedent for so saying. We are not at all disposed to make such a precedent.

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It is not necessary in this case, nor shall we, therefore, attempt the difficult and delicate task of defining how far, and in what instances, the law of society has restrained the right of defence for the security of the lives of our citizens from the wanton cruelty and guileful malice of those who might otherwise indulge their evil passions under the guise of protecting property. We shall content ourselves with saying the restraint does not, and should not, extend to this case. That where a person has valuable property in a strong warehouse, well secured by locks and doors, that he may, as an additional security at night, erect a spring gun which can only be made to explode by entering the house. That the defence used by the defendant was, therefore, lawful, and the calamity which ensued, ascribable to the slave's own act. We know of no process by which the defendant could have obtained the protection of the law against an unknown thief. The law did not require him to hire a guard for its protection. Neither was he bound to leave it to the spoliation of nocturnal depredators. The time and circumstances constituted a case of necessity that legitimated the means resorted to.

Where a person has valuable property in a strong warehouse, well secured by locks and doors, it is lawful for him, as an additional security at night, to erect a spring gun which can only be made to explode by entering the house. And if a slave break and enter such warehouse in the night time with intent to steal, and is mortally shot by such spring gun, the owner of

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the ware-  
house, who  
erected the  
spring gun is  
not responsi-  
ble for the  
value of the  
slave.

This conclusion is sustained by the respectable authority of Rutherford, in his *Institutes*, 336. "Some injuries of a lower order," says he, "though not irreparable in their own nature, are so by accident. There is the same reason why a man should be at liberty to defend himself against these, as there is, why he should be at liberty to defend himself against those of higher order, where he can have no assistance from civil jurisdiction. Of this sort we may reckon the loss of goods, where the person who attempts to steal them is unknown; or where, though he is known, there is a moral certainty that the public can never interpose, so as to obtain the restitution of them. The rules that ought to be observed in these circumstances, are the same as ought to be observed in a state of nature. And where the law of nature would justify a man, considered as an individual, in proceeding to extremities, the same law will justify him in taking the same measures, though he is a member of society." Meaning of course, as we presume, except so far as restrained by the ordinances of society. As before stated, we know of no law restraining the right as exercised in this case.

We have been unable to find any case in which this question has come before any of the courts in America, or any English court, prior to the revolution. But in the case of *Halt vs. Wilkes*, III B. and A. 304, it was decided by the court of King's Bench, that a person might lawfully place loaded spring guns in enclosed grounds to prevent depredations; and the plaintiff in that case who had received severe bodily injury, whilst gathering nuts, from a gun so placed, was non-suited. It is true, the plaintiff had notice of the gun's being in the woods, but that seems not to have been treated as a controlling circumstance, for it is conceded by the court, that if the setting of the guns had been unlawful, notice to the plaintiff would not have exempted the defendant from liability. We are not called on now to give our dissent or assent to the principle ruled in this case, but mention it for the double purpose of shewing the extent to which such means have been permitted in England for the protection of property, and of authorizing a suggestion of the propriety of legisla-

live interposition, for the restraining within due and proper bounds the exercise of any such right. The determination in *Wilkes vs. Hall* was, no doubt, the occasion of the passing of the act of the British Parliament, VII and VIII Geo. 4 c. 18, which declares, "that if any person shall set or place, or cause to be set or placed, any spring gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same, or whereby the same, may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, the person so setting or placing, or causing to be set or placed, such gun, trap or engine as aforesaid, shall be guilty of a misdemeanor. Provided, that nothing in this act shall be deemed to make a misdemeanor within the meaning thereof, to set or cause to be set, from sunset to sunrise, any spring gun, man trap or other engine, which shall be set in a dwelling house for the protection thereof."

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The judgment must be affirmed, with costs.

*Morehead and Brown* for plaintiff; *Crillenden and Monroe*, for defendant.

### Berry et al. vs. Berry's Heirs.

Appeal from the Woodford Circuit; KELLY Judge.

*Bond, interleniation of. Equities.*

CHANCERY.

Case 149.

Chief Justice ROBERTSON delivered the Opinion of the Court. October 10.

THIS case was once before in this court, when the first decree of the circuit court, perpetuating the injunction to a judgment in ejectment against the appellees, was reversed for want of proper parties.—See *III Monroe*. The proper parties having been brought before the court after the return of the case, and some further preparation having been made, another decree, substantially the same as the first, was rendered; and the defendants in the court below have again appealed.

Addition to a bond, made by consent of both parties to the bond, does not avoid it.

As various points are now urged, which were either not presented by the former record, or were not

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noticed in the opinion of this court which was revoked, when, on consideration, the first decree was reversed for defect of parties, it will be proper, before we proceed to state and decide upon them, to present an outline of the case as now exhibited. The facts are not only multifarious, but so vague and imperfect in some important particulars, as to compel this court to resort to deductions not perfectly conclusive or satisfactory to the judicial mind. For example, the record of the action of ejectment is not exhibited, nor are the means furnished for ascertaining with certainty what land, or how much, was adjudged to the appellants, or the extent or locality of their *respective* interests. Other examples of imperfection and confusion in the facts might be added, but are deemed superfluous. The following brief narrative will present such of the facts as are most clear and important.

In 1784, Arthur Fox bound himself, by a covenant in writing, to convey to John Craig one third, and to John Hawkins Craig another third of all the land which should be "obtained" on his entry upon "Buck Run, Rough's Run and Glenn's Creek," in the county of Woodford. John Craig was, as we infer, the locator. A patent was obtained in the name of Arthur Fox for 1480 acres, (in 1785) founded on the aforesaid entry. In 1785 or 6, and prior to any partition, John Craig sold 100 acres of land to Benjamin Berry, and another 100 acres to Samuel Berry; and sometime in 1786, both Benjamin and Samuel Berry were settled, each on the tract which he had bought from Craig—who shortly afterwards executed a separate bond for a title to each for 100 acres, to include his settlement, but without any other designation of locality; the bond to Samuel was dated—1788; the date of the bond to Benjamin was—1786. In 1790, John Craig also sold and covenanted to convey to one Endicut 80 acres, designated by course and distance, and to adjoin Benjamin Berry on the west; that bond was assigned to the said Benjamin in 1795; and not long afterwards, he bought from John Hawkins Craig his entire interest in the 1480 acres. In 1798, having ascertained that an adverse claim of one C—ow interfered with the

100 acres which had, in the mean time, been laid off to Samuel Berry by survey, and covered about 50 acres thereof on the south side, and considering Crow's equity superior to that of Fox, John Craig and Samuel Berry agreed to yield to that claim, and thereupon, in consequence of a compromise between those parties, S. Berry bought the interference for the purpose of securing improvements which he had made thereon, and John Craig laid off to him by another survey in 1801, the same quantity adjoining the residue of his first 100 acres on the west, so as to secure to him 100 acres unincumbered by any conflicting claim. About the same time, Samuel Berry bought from John Craig 16 acres adjoining (on the west end) the 100 as surveyed, and agreed to pay, and we presume did pay, to Benjamin Berry one dollar an acre for his assent to the contract, because, as we infer, it was uncertain whether John Craig's one third, when it should be finally ascertained, would be sufficient in extent to secure to S. Berry the 116 acres, and to Benjamin Berry his 180 acres. In 1802, Robert Johnson, as surviving trustee, to whom John Craig had, in 1791, conveyed for his own use his equity in the 1480 acres, assigned to Benjamin Berry, for himself and Samuel Berry, Fox's bond to Craig—took up Craig's bonds to B. and S. Berry, and took from B. Berry a receipt acknowledging that he had taken an assignment of Fox's bond to Craig in lieu of the bond to himself and Endicut for 180 acres, and of the bond to Samuel for 100 acres, *interlined in 1801, with Craig's assent, so as to read, "116 acres."* Fox having died intestate, commissioners, appointed at the instance of B. Berry acting for himself and also (as it seems probable) for Fox's heirs (four in number) made partition of so much of the 1400 acres as they deemed to have been "*saved*"—allotting to B. Berry J. H. Craig's one third and J. Craig's one third so as to include the land previously surveyed to B. Berry and Endicut, and to S. Berry, in 1801, and *excluding* the land covered by Crow's claim; and B. Berry stated to the commissioners at the time of the allotment that he represented S. Berry, (who was not able to attend to such business) and that, al-

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**BERRY ET AL** though he doubted the superiority of Crow's claim, yet, as Samuel had bought it, and held under it, he was willing that he might continue to hold under it, and that Craig's bond to Samuel (as it was when surrendered to Johnson) was entitled to be fulfilled equally with the bonds to Endicut and himself: these facts appear from the deposition of one of the commissioners, (H. Bowmar,) but the report of the commissioners has not been exhibited, and we have no means of ascertaining, with precision, the quantity or boundaries of the allotment to B. Berry of two thirds or of that to Fox's heirs of one third. Claiming 33 acres in consequence of a purchase alleged to have been made to him under an execution against Fox and John Craig in 1801, and believing that the residue of the "safe" land, including Crow's interference, was only about 868 acres, Benjamin Berry procured conveyances, from three of the heirs of Fox and from commissioners appointed to act for the heirs of the deceased heir of Fox, for 289 acres to himself for J. H. Craig's third, and for the 180 acres surveyed to him and Endicut by John Craig, and also (assuming to act for S. Berry,) procured, in the same way, conveyances to him for the 100 acres as originally surveyed to him by John Craig, including Crow's interference, and for 9 acres more adjoining that 100 acres on the west; thus making out and distributing 289 acres for John Craig's third part. There is no proof that S. Berry was privy to or ever approved that arrangement. Shortly after the date of those conveyances, the ejectment was brought, but was not decided until after the death of S. Berry. We presume that the object of that suit was to recover the 16 acres, and so much of the 100 laid off to S. Berry, in 1801, as were not included in the conveyances to him procured by B. Berry in 1815. The 16 acres, excepting a fraction of about one acre, are covered by the deeds to B. Berry for 289 acres. It is suggested in the record, but is not conclusively shewn, that B. Berry had purchased from Fox's heirs 63 acres, covering the fraction of the 16 acres not included by the deeds for 289 acres, and also covering all or nearly all of the 100 acres claimed and held by the appellees under S. Berry's

survey of 1801, and not included in the deeds of BERRY ET AL. 1815 for 109 acres. The original bill prayed for conveyances for the 16 acres and for the 100 acres as surveyed in 1801, and ever since held, and for a perpetuation of the injunction to the judgment at law, and the circuit court has decreed accordingly.

The objections which the appellants have urged in this court to the decree of the circuit court, may be reduced to two classes. 1st. Such as deny relief to any extent; and, 2nd, such as would deny relief to the extent to which it has been decreed.

I. Two grounds have been relied on as sufficient basis for the first objection. 1st. That John Craig conveyed all his interest in the land to trustees for his own use. 2nd. That Craig's bond to S Berry was rendered void by the insertion of the words, "and sixteen," in 1801. These positions are not tenable. The second could be made plausible only by the assumption that, as between John Craig and Samuel Berry, the addition to the bond, made in 1801, with the knowledge and consent of both, avoided their contract contrary to the design or will of either! For it satisfactorily appears, that the interlineation was made at the instance and with the approbation of both J. Craig and S. Berry, and in fulfilment of their supplemental contract. The 1st cannot be rendered even plausible by any assumption or hypothesis which the facts of the case would excuse; for not only would the preexisting equity of S. Berry have been unaffected by even a conveyance of the legal title to trustees for Craig's own use, because in equity he would have been still deemed the true owner, but he had no legal title, and even the equity which he attempted to secure to himself, was curtailed in extent, if not wholly destroyed, by his previous transfers of it, or portions of it, to B. Berry, S. Berry and Endicut; and thus the deed of trust did not divest either S. Berry or Craig of any equity which preexisted in either.

II. In considering the extent to which the appellees may be entitled to relief, some perplexity and doubt result unavoidably from the scantiness of some



**BERRY ET AL** of the facts, and the doubtful import of others, indispensable to a just and satisfactory conclusion.

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As it has not been intimated that S. Berry ever accepted the deeds procured by Benjamin in 1815, it could not be doubted that the appellees would be entitled to a decree for a conveyance of the legal title to the 109 acres described in those deeds, and including the 100 acres originally allotted by John Craig, had they desired a conveyance to that extent and that only. But they insist that 50 acres of that boundary should not be included, because their ancestor was permitted to purchase that much from Vawter, and to hold it under Crow's claim, and that, therefore, they are entitled to a decree for the 100 acres as surveyed in 1801, and also to the additional 16 acres then bought from Craig, and ever since occupied. On the other hand, the appellants deny that the appellees have an equitable right to a decree for the 116 acres as surveyed in 1801, because, as they say, the whole of J. Craig's interest is not sufficient in quantity to secure to B. Berry his 180 acres, and to the appellees the 116 acres claimed by them; and they insist also, that the appellees should not, in any event, obtain a decree even for the 100 acres as surveyed in 1801, unless they be compelled to surrender the possession of the 50 acres which S. Berry bought from Vawter in 1798, and which constituted a part of the 100 acres originally bought from Craig.

As John Craig yielded to Crow's claim, and not only assented to the purchase of it by S. Berry, but, in consequence thereof, laid off to him 50 acres so bought from Vawter; and as Benjamin Berry, even after he had acquired a right to J. H. Craig's third, and whilst he seems to have been the agent of Fox's heirs, assented to and acquiesced in that arrangement, and more especially as none of the appellants ever manifested any dissatisfaction until about the time when the ejectment was brought, we shall not, in this controversy, consider the appellees as holding that 50 acres under Craig or Fox. Nor shall we now enquire into the relative nature of Crow's title. The purchase from Vawter seems to have been made in perfect good faith, under an honest and mutual

conviction that his equity was superior to that of **BERRY ET AL**  
**Fox** ; and we cannot, therefore, under all the cir-  
 cumstances, deem it just to include that 50 acres in **VS**  
 the estimate of the quantity to be decreed to the **BERRY'S**  
 appellees, or to compel them, by a decree in **HEIRS.**  
 this case, to surrender the possession thereof to  
 the appellants, who have not shewn, or attempt-  
 ed to shew, that Fox's equity is superior to that  
 of Crow, or that there has been any infidelity,  
 fraud or surprise as to themselves, in the conduct of  
 S. Berry or his heirs. As the case is not prepared  
 so as to require a decision on the original equities of  
 Crow and Fox, we shall not now enquire how far  
 such a decision may be hereafter precluded by the  
 apparent acquiescence of the appellants in the pur-  
 chase from Vawter, and their (consequently) appar-  
 ent submission to Crow's claim. But it is evident  
 that, as the appellees hold under Crow, and insist on  
 being permitted to do so, the 50 acres, so held, must  
 be deducted from the quantity which remained for  
 division among the original parties—Fox, J. Craig  
 and J. H. Craig ; and, consequently, the one third  
 to which each was entitled must, for the present, be  
 deemed less by  $16\frac{2}{3}$  acres.

Were it admitted, as alleged by the appellants,  
 that, after deducting the quantity taken by claims  
 superior to that of Fox, only 900 acres of the origi-  
 nal 1480 remained, and that the 50 acres bought  
 from Vawter, and 33 acres bought by B. Berry in  
 1801, under an execution against Fox's heirs and  
 John Craig, are included in the 900 acres, and must  
 be counted so as to make out that quantity, still the  
 appellees would be entitled to a decree for the 100  
 acres as laid off to S. Berry by J. Craig, in 1801.  
 The sale under the execution was made after Craig  
 had surveyed the 116 acres to S. Berry; and there-  
 fore, that 116 acres, as well as the 180 previously  
 sold by Craig to B. Berry and Endicut, were not  
 affected by the execution; and indeed no part of  
 Craig's interest passed by the sale under the execu-  
 tion, because, whatever right remained to him was  
 only equitable, and, therefore, as Fox alone held a  
 legal title subject to the execution, 33 acres of his  
 third part must be deemed to have been sold by the

**BERRY ET AL** sheriff; and consequently the interest remaining to  
**VS.** Craig, or to those claiming under him, would be o. c.  
**BERRY'S** th. r. of 850 acres, or  $283\frac{1}{2}$  acres, a quantity more  
**HEIRS.** than sufficient to secure to B. Berry 180 acres, and  
 to the appellees the 100 acres as surveyed in 1801.  
 Wherefore, according to the allegations and admissions of the appellants themselves, the appellees seem to be entitled to the 100 acres as surveyed in 1801. And it seems to us that, even on the same hypothesis, they are entitled also to the 16 acres sold by Craig to S. Berry in 1801. To  $3\frac{1}{2}$  acres, the quantity remaining to Craig's part, after deducting 280, they are indisputably entitled. As B. Berry has obtained a deed for 289 as John H. Craig's third, he has, according to his own showing,  $5\frac{1}{2}$  acres more than J. H. Craig was entitled to; and as he did, for a valuable consideration, assent to the sale of the 16 acres by John Craig, in 1801, we are permitted to infer that it was mutually understood at that time, that S. Berry was to have the same right to the 116 acres then laid off to him, as he had originally to the 100 acres as first bought by him in 1786. And consequently, as Endicut's contract for 80 acres, (assigned by him to B. Berry, prior to 1801,) was posterior to the contracts made by B. Berry and S. Berry, in 1786, the latter must be fulfilled first, and if there be only  $283\frac{1}{2}$  acres in Craig's part, the deficit must fall on B. Berry as the holder of Endicut's contract for 80 acres. This is the equitable consequence of what we infer to have been the understanding between Craig and B. and S. Berry, in 1801; and this inference is fortified by the partition in 1805, and by the apparent acquiescence of all the parties for many years.

B. Berry's deed for 289 acres must cover at least 15 of the 16 acres claimed by the appellees under the contract of 1801; and it seems to us that equity requires that his judgment of eviction should, to that extent at least, be enjoined, and that a conveyance should be made to the appellees.

It is impossible to ascertain what interest Fox's heirs have in this controversy. In the opinion in III Mon. it is stated that three of the four heirs had conveyed all their right to B. Berry, but that the

heirs of the fourth still retained their interest. **BERRY ET AL**  
 Such a deduction is not authorized by the record as **VS,**  
 it is presented to us; nor can we decide, (as suggested **BERRY'S**  
 in the record,) that B. Berry owns the interest of **HEIRS.**  
 all the heirs. But be this as it may, B. Berry acted  
 as the agent of the heirs, and, in that character, procured the partition to be made in 1805, sanctioning the contracts and surveys made in 1801. He and the heirs seem to have acquiesced ever since, until about the year 1816, and do not even now complain of error or mistake in the partition, or ask for a re-partition. Wherefore, should it turn out as intimated, that there may not be 283½ acres remaining for Fox's third, the deficit must be supplied from B. Berry's excess, and the appellees have now no concern in that matter. Moreover, there is no proof or allegation about the quality of the land, and consequently, if there be any small deficit in quantity, this court cannot know that it was not supplied by an equivalent advantage in quality.

But there is no proof that will allow this court to assume that J. Craig's third will not exceed in quantity 283½ acres. The appellees allege that between 800 and 1000 acres of the 1480 acres granted to Fox have been "saved," and that the quantity saved is sufficient to entitle them to their entire 116 acres as surveyed in 1801. The appellants say that only 900 acres had been saved, including the 50 acres covered by Crow's claim and the 33 acres purchased under the execution. And there is no direct proof as to the quantity actually safe from the interference of better claims. But we are of the opinion that it was incumbent on the appellants, and not the appellees, to prove what quantity of land remains. The patent, the partition in 1805, the sale and the surveys in 1801, and the long acquiescence therein, are sufficient, *prima facie*, to authorize the presumption that the quantity remaining is at least 900 acres, independently of the 50 acres covered by Crow. We cannot, therefore, in the absence of proof, decide that there is not land enough to entitle those claiming under John Craig to 296 acres; and consequently, even if a deficit in quantity could affect the equity of the appellees, the facts, as they are now repre-

MERRIFIELD sented, would not allow a reversal of the decree on that ground.

VS.  
THE SHAKERS.

It is evident from the foregoing view, that there should be no decree for restitution of the 50 acres held by the appellees under Crow's claim. Nor is there any sufficient ground established for any decree whatever in favor of the appellants or any of them.

Wherefore, the decree of the circuit court is affirmed.

*Denny, Wickliffe & Wooley*, for appellants; *Crittenden and Talbot*, for appellees.

# CHANCERY. Rebecca Merrifield vs. The Shakers.

Case 150.

Error to the LEGAL Circuit; BRODWAY, Judge.

*The Shakers. Tenants in common.*

October 10. Chief Justice ROBERTSON delivered the Opinion of the Court.

REBECCA MERRIFIELD (the plaintiff in error) proceeded by bill in chancery, according to the provisions of the statute of 1828, (session acts, 137,) for the purpose of obtaining a decree against "the society of people called Shakers, at West Union," in this state, for the value of personal property which, as her bill alleges, she carried with her to that community, and which they promised to restore to her whenever she should leave them, as she avers she had done.

The circuit court sustained a demurrer to the bill, and the only question now presented is, whether that decision was erroneous or not.

According to the allegations in the bill, the plaintiff had a clear legal remedy, (if she had any right at all,) and would have had no right to maintain a suit in chancery, unless the act of 1828 be valid, and unless her case as presented by her bill, be embraced by the provisions of the act.

The act provides, "That it shall and may be lawful for any person having any demand exceeding the sum of fifty dollars, founded on any contract, implied or expressed, against any of the communi-

ties of people commonly called Shakers, *living together and holding their property in common*," to maintain a suit in chancery against such community of Shakers in a peculiar mode.

SAMPSON'S  
ADM'R.  
VS.  
GRAHAM.

The bill describes the defendants as "a society and community of people commonly called Shakers;" but it does not allege that they hold their property in common; and surely the court could not decide, on its own judicial knowledge, that the *defendants* hold *their* property in common; such a deduction would not necessarily result from the fact that they are denominated a community of Shakers. And if the act of 1828 be, in all its provisions, constitutional, it cannot be legitimately construed as embracing the defendants, unless they hold their property in common. The legislature did not *decide* that all communities of people called Shakers hold their property in common; nor could any such legislative opinion, if expressed, alter or affect the manner in which any such community may, in fact, hold property.

Bill against  
the Shakers,  
filed with a  
view to recover  
of them a  
demand under  
the statute of  
1828, must describe  
them as a  
people who  
hold their  
property in  
common.

Wherefore, whether the act of 1828 be valid or invalid, as the bill does not present a case provided for by the act, and as the chancellor had no jurisdiction of the cause of action, independently of its provisions, the circuit court did not err in sustaining the demurrer.

Decree affirmed.

*Monroe*, for plaintiff; *Crittenden* and *Wickliffe*, for defendants.

## Sampson's Administrator vs. Graham.

Error to the Franklin Circuit; Todd, Judge.

Case 151.

*Administrator. Goods of intestate which are in foreign countries. Comity of nations.*

Chief Justice R. BERTSON delivered the opinion of the Court.

October 11.

As the jury might have inferred from the evidence, that the slave sold in Tennessee, by the plaintiff in error, was the property of the intestate, and as it cannot be material whether the plain-

If adm'r, who is appointed in this state to administer

**PALMER**  
vs.  
**KENNEDY &c.**

the assets of an intestate who was domicilled and who died in this state, sell a slave of intestate which is in a sister state, he will be liable, in a suit against him here by a creditor of intestate, for the price of the slave. By the common law adm'r is entitled to goods of intestate wherever they may be. If, by the laws of a foreign country, in which part of an intestate's goods are, the adm'r in this state is prohibited from taking or appropriating them, he will not be liable for them.

tiff claimed the slave in his own right or as administrator in Kentucky, therefore, the only point presented for consideration is, whether or not an administrator appointed in Kentucky, to administer the assets of an intestate who was domiciled and who died in this state, should be held liable in a suit against him here, by a creditor of the intestate, for the price of a slave, the property of the intestate in Tennessee, but afterwards sold by the administrator. On this point the circuit court instructed the jury affirmatively, and verdict and judgment were rendered accordingly against the administrator, who is the plaintiff in error.

We concur with the circuit court. The plaintiff, as administrator, according to the common law, was entitled to the slave of his intestate wherever that slave might have been; and it is said in VI Co. 47, a. that if an executor hath goods in any part of the world, he shall be charged with them. How an administrator may obtain the possession of goods of his intestate, in a foreign country, depends on the comity of the foreign state; and if, by the laws of the foreign government, he be prohibited from taking or appropriating such goods, he will not be liable for them. But as the plaintiff did obtain possession of the slave, the money for which he sold him, should be deemed assets in his hands in Kentucky, especially as no law of Tennessee, or other fact inconsistent with such a legal deduction, has been shown or can be presumed.

Wherefore, the judgment is affirmed.

*Monroe*, for plaintiff; *Haggin and Sanders*, for defendant.

#### APPEAL.

Case 152.

October 12.

### Palmer vs. Kennedy &c.

Error to the Garrard Circuit; BRIDGES, Judge.

*Appeals from Justices. New trial. Co-defendants.*

Judge UNDERWOOD delivered the opinion of the Court.

A justice of the peace rendered a judgment in favor of Palmer against Kennedy and Goldsberry jointly. Kennedy alone prayed an ap-

peal, and entered into an appeal bond in the clerk's office of the circuit court, the amount in controversy being above five pounds. Palmer moved to dismiss the appeal because Goldsberry did not unite in it. The court overruled the motion, and permitted Kennedy to execute a new appeal bond with a new surety. The last bond differed from the first in no essential particular, except this—it stated that Kennedy and Goldsberry both appealed from the judgment of the justice; whereas the first bond stated that Kennedy alone appealed.

PALMER  
VS.  
KENNEDY & Co.

The only question raised upon the foregoing facts is, did the circuit court err in refusing to dismiss the appeal?

We are of opinion that there is no error in the record to the prejudice of Palmer. The act of 1812, raising the jurisdiction of justices of the peace, allows an appeal to the circuit court, where the judgment of the justice exceeds five pounds, and provides that "no appeal shall be dismissed for any irregularity in the proceedings had before the magistrate; but the same shall be tried on its merits as though no trial had been previously had thereon." If there be two or more defendants, and judgment is rendered against all of them, can one or more, who may elect to abide by an erroneous judgment of the justice, prevent the other defendant from prosecuting an appeal, by refusing to unite in the appeal bond, or to join in the prayer for the appeal? Certainly not. It this could be done, a statutory provision, evidently designed to provide for a revision of the errors of the justice of the peace, and to have the rights of the parties adjudged by a more competent tribunal, would be defeated by the fraud or perverseness of a co-defendant. To prevent this, any one of the defendants must have the right to take up the case by appeal, and this necessarily carries all the defendants into the circuit court as parties, for there the case is to be "tried on its merits, as though no trial had been previously had thereon." Hence it is necessary that all the parties should be brought up. The idea, that the judgment of the justice remains in full force against the defendant

From a joint judgment, by a justice, against several defendants, either of the defendants has the right and power to take up the case, by appeal, to the circuit court. And thereby all of the defendants are necessarily brought into the circuit court, as parties to the cause.



PAYNE  
vs.  
SMITH.

who refuses to appeal, and that another judgment may be rendered in the circuit court against the defendant who appeals, (thus splitting up a single cause of action into a plurality of judgments) cannot be tolerated for a moment.

When a cause is transferred, by appeal to the circuit court, the justice has no longer any power over it.

The justice is required to transmit all the papers had before him on the trial, together with a certificate of the costs, to the clerk of the circuit court, when an appeal is prayed. This requirement shows that the legislature did not intend to regard the judgment of the justice, after the case was properly removed to the circuit court, as possessing any validity whatever. When the cause is transferred to the circuit court, the justice has no further any power.

If there be two or more defendants and judgment is rendered jointly against them, either of them may move for and obtain a new trial against the will of his co-defendants.

If there be two or more defendants, and judgment be rendered against them jointly, in the circuit court, one who considers himself aggrieved may move for a new trial and obtain it, against the will of his co-defendants. We see no reason why the same doctrine should not apply so as to allow the prosecution of an appeal by one, especially from the judgment of a justice of the peace, whose jurisdiction in relation to sums above five pounds is merely *initiatary*, when the case is transferred, by appeal, to the circuit court.

The motion was properly overruled. Had no new bond been executed, it would have been properly overruled.

Judgment affirmed with costs.

Turner, for plaintiff; Anderson and Caperton, for defendant.

### Payne vs. Smith.

Case 153.

Error to the Franklin Circuit; TODD, Judge.

*Statute of limitation, plea of. Actio non accrevit.*

October 13. Judge UNDERWOOD delivered the opinion of the court.

Where a cause of action does not immediately

WHERE a cause of action does not immediately arise upon the making of a promise, but results from a breach happening years after the promise is made, the plea of non assumpsit within

five years is not a bar. If the limitation is relied on, it should be *actio non accrevit*, &c. The limitation does not run until there has been a breach of the promise. An undertaking to pay money five years hence is not barred until five years after the money has become due.

The statute of frauds did not make the declaration bad, because no writing was set out. The judgment upon the demurrer was erroneous. The plea was bad.

Judgment reversed, with costs, and cause remanded for judgment against the plea.

*Monroe*, for plaintiff.

POSTON  
VS.  
YOUNG  
arise out of the making of a promise but results from a breach happening years after the promise is made, the plea of non assumpsit with a *non est* is no bar.

## Poston vs. Young.

Error to the Logan County Court.

MOTION.

Case 154.

*Guardian, appointment of. County court. Orphans.*

Judge NICHOLAS delivered the opinion of the court.

October 13.

UPON the application of Young, the county court appointed him guardian to the infant daughter of Poston, it appearing that she was the proprietor of a valuable estate derived from her deceased mother, and the court having first offered to confer the appointment on Poston, which he refused to take.

County court has no jurisdiction or power to appoint a guardian for an infant while the father of the infant is alive.

The court had no jurisdiction or authority to appoint a guardian to the infant. The statute only confers the authority in cases of orphans. An orphan, in legal parlance, is a fatherless child.

A orphan, in legal parlance, is a fatherless child.

Order reversed, with costs, and case remanded, with directions to set aside and annul the order.

*Morehead and Ewing* for plaintiff; *Breathitt* for defendant.

## CHANCERY.

## Peyton's Heirs vs. Alcorn.

Case 156.

Appeal from the Lincoln Circuit; BRIDGES, Judge.

*Lands of infants, sale of.*

October 16. Chief Justice ROBERTSON, delivered the opinion of the Court.

7m 502  
Case 2  
o112 386

ON a petition filed by Alfred Alcorn, as guardian of David Alcorn, the circuit court decreed the sale of a tract of land held by the said ward, and others, his co-heirs by descent, although the infant children of a deceased co-heir of the petitioner's ward, and who were made parties, objected to the sale of their undivided interest in the land, and persisted, through their father, as next friend, in opposing a decree.

The statute of 1796, II Digest, 668, does not apply to the case, because the interest of each heir exceeded \$100 in value.

Act of 1813, which authorizes the sale of the real estate of infants, should be strictly construed.

Nor does the more comprehensive act of 1813, II Digest, 666, give any authority whatever to render such a decree as that now complained of.

There are sufficient reasons for requiring a strict construction of *such an act* of assembly. But no interpretation, however liberal, can sustain the power of the circuit court to decree the sale of an infant's land *without his consent*, or that of his guardian.

Chancellor cannot, *without the consent* of the infant or his guardian, decree the sale of infant's land.

Wherefore, the decree is reversed, and the cause remanded, with leave to decree the sale of the interests of only so many of the heirs as have consented to such sale, and shall desire it.

Cunningham for appellants; Anderson for appellee.

## CHANCERY.

## Smith vs. Hoskins' Heirs &amp;c.

Case 156.

Appeal from the Washington Circuit; KELLY, Judge.

*Administrator. Assets. Settlement with county court.*

October 15. Judge UNDERWOOD delivered the opinion of the Court.

SMITH united with the widow of Hoskins in the administration of his goods and chattels. The county court removed him, and appointed an

other administrator. He thereupon filed his bill against the heirs and administrator, so appointed, alleging that he had disbursed for the estate more than the amount of the assets which had come to his hands, and praying for a decree against them for the excess. He exhibited a settlement of his accounts made with the county court, and a balance struck in his behalf, as the only evidence of the justice of his demand. He charged, that the new administrator had assets and the heirs' estate, by descent, sufficient to pay his demand.

SMITH  
vs.  
HOSKINS,  
HEIRS & C.

The court dismissed his bill without prejudice, and he has appealed.

If Smith, previous to his removal, paid debts of the intestate out of his own funds, expecting assets at the time, and was removed before assets came to hand, it would be unjust that he should lose the sums advanced. In such a case, we think he should be substituted for the creditor, and permitted to assert in a court of equity against the subsequent administrator and heirs, the demand of the creditor which he had extinguished. The case of *Trumbo and ux. vs. Sourency, III Monroe, 284*, is an authority to shew that where an executor pays debts beyond the amount of the personal estate, specifically devised, he has a right to proceed against the heirs for the excess. The same principle is applicable here.

Where an administrator pays debts of his intestate out of his own funds, expecting assets at the time, and is removed from the administration before assets came to hand, he is entitled to reimbursement out of the estate which has descended to the heirs.

Our of ground difficulty has been to determine whether Smith has shewn himself entitled to any decree upon the proof. The settlements made with the county court are his only evidence. We have determined to consider those settlements as *prima facie* evidence in his behalf. *Burns vs. Burton, I Marshall, 349*, is an authority in support of our conclusion. As the settlements shew a balance in favor of Smith, and as the heirs do not deny the assets charged to have descended to them, and as there is nothing impeaching the correctness of the settlements made by the county court, we think Smith was entitled to a decree.

Settlement made by administrator with the co. court, decided to be *prima facie* evidence.

So much of the assets which came to the hands of Smith and the widow of Hoskins, as was necessary

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ET AL.  
vs.  
SANDERS.

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to pay the expenses of administration and the allowances made for their services in the administration, should be applied to these objects in preference to the payment of debts. These charges diminished the assets, and should be deducted in ascertaining the amount applicable to payment of creditors. Whatever sums Smith paid to creditors above the assets applicable to their satisfaction, should have been decreed, in his favor, against the assets in the hands of the heirs, the second administrator having denied assets, and their being no proof against him.

Decree reversed, with costs, and cause remanded for proceedings in conformity to this opinion.

*Rudd* for appellant.

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WILL CASE. **Robert Sanders et al. vs. George W. Sanders.**

Case 157.

Error to the Gallatin County Court.

*Wills, revocation of. Estoppel.*

October 16. Chief Justice ROBERTSON delivered the opinion of the Court.

THIS writ of error is prosecuted to reverse an order of the county court of Gallatin admitting to record, as the last will of Nathaniel Sanders, senior, a paper purporting to be his will, and to have been published in 1825.

The execution of the will, and the disposing capacity of the testator, have been satisfactorily proved. But the plaintiffs in error, insist on the following, as sufficient causes for setting aside the will. First, that it was revoked by a subsequent will. Second, that it was cancelled by tearing off the testator's signature, in his presence and with his concurrence. And third, that all parties concerned are estopped by an agreement under seal, and by a decree thereupon for distributing the estate of the testator, as if he had died intestate.

First. The paper relied on as a revocation was rejected by the county court, and that order is in full force. We are not permitted now to reverse the or-

Two wills of  
the same per-  
son are pre-

der rejecting that document; and consequently, we cannot now decide, that the will of 1825 was ever revoked.

SANDERS  
ET AL.  
VS.  
SANDERS.

Second. It has been proved, that the testator's name was torn off, in the room in which he was living, by his son, Robert Sanders, jr. immediately after he had acknowledged his signature to the paper, afterwards rejected by the county court. But the facts tend strongly to prove, that the testator had not, at that time, a disposing mind. And there is not only no proof that he authorized or sanctioned the act of his son Robert, but there is good reason for inferring from his quiescent, torpid, and almost senseless condition at the time, and from other facts which have been proved, that he did not even know that his signature was to be or had been torn off. Wherefore, we do not feel authorized to decide that the will was cancelled.

sented to the county court for record, one of a more recent date than the other, the county court admit the elder will to record, and reject the more recent, and a writ of error is prosecuted to reverse the order admitting the elder will to record, decided, that, as the order of the county court rejecting the more recent will remains in full force, this court cannot, upon this writ of error, revise the order rejecting the more recent will, and consequently cannot, upon this writ of error, determine the elder will was revoked by the more recent.

Third. All the persons interested in establishing the will were not parties to the agreement relied on as an estoppel. But even if they had been, no such agreement could have the effect of revoking or destroying the will. If the agreement be obligatory on the parties to it, this court cannot enforce it on this writ of error; but the remedy must be first sought in another forum.

The only question we can now decide is, "*was the document of 1825 the last will and testament of Nathaniel Sanders, senior, at the time of his death?*" If it was then his will, it is yet his will; and it cannot be a will as to some only, but must be a will as to all of the devisees.

Nor can the decree for distributing the estate conclude the question, and the only one presented, upon this writ of error. The decree seems to be chiefly interlocutory; and does not affect the will itself. Neither the execution of the will, nor the capacity of the testator was involved or adjudicated on.

The only effect which the facts presented on this last point could legitimately have in this case, is, that they might operate as some evidence of the

**PALMER**  
**vs.**  
**MERRIWETHER.**

cancellation of the will ; but, allowing them their utmost influence in this particular, we have not been able to decide that the will was ever properly cancelled. We must, therefore, as the facts now appear, consider it as the true last will of Nathaniel Sanders, senior, deceased.

Wherefore, the order of the county court is affirmed.

*Haggin, Monroe, and Sanders, for plaintiffs; Crittenden and Marshall, for defendants.*

**SCIRE FACIAS.**

Case 158.

## Palmer vs. Merriwether.

Appeal from the Jefferson Circuit; PIRTLE, Judge.

*Bail. Scire facias. Ca. sa.*

October 16. Judge NICHOLAS delivered the opinion of the court.

*Scire facias* against bail, cannot be maintained until after a *ca. sa.*

and that having been abolished, there is now no remedy against the bail.

THIS is an appeal from a judgment rendered against the appellant, upon a *scire facias* issued on her acknowledgment, as special bail, made in 1824.

The case is, in all respects, like that of *Peteet vs. Dudley*, VII Monroe, 130, where it was determined that the bail was not liable. That decision is now called in question, and we are invited to review and overrule it. This we should have great hesitation in doing, even if we entertained much greater doubts of its propriety than we do. The legislature has since provided for the *casus omissus* suggested in that opinion, and many cases were ruled in the circuits in conformity to it. When a construction has thus been given to an act of assembly by a solemn adjudication of this court, that construction should never afterwards be lightly changed. Never, except upon clear grounds and upon adequate motives of general policy. The evils likely to ensue from such vacillation in the decisions of this court upon the construction of the statute, are much greater than would generally arise from an erroneous construction. We ought never to disturb a construction solemnly given by our predecessors years back, except we feel morally certain not only that

they were wrong, but that we are right in the proposed substitute. Now it so happens, that we doubt the strict propriety of every construction that has been attempted to be given to the act of 1821 upon this subject. We believe a similar doubt has generally pervaded the best professional minds in the state. It must be a bold mind indeed that ventures to suppose it has certainly arrived at the true construction of that act. There never was one, perhaps, the true construction of which it was more impracticable to ascertain with absolute certainty.

PALMER  
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MERRIWETHER.  

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The form of the recognisance of bail prescribed by an act of Virginia, still in force, was the same in substance as that used in England. Memorandum "that on the       day of       E F undertook for C D, at the suit of A P, that in case C D should be cast in said suit, he, C D, will pay and satisfy the condemnation of the court, or render his body to prison in execution for the same, or that E F will do it for him." See I Littell's Laws, 482. By the act of 1810, I Dig. 258, the form was altered to a simple acknowledgment of special bail, which was declared to have the force of a recognisance.

According to the terms of this recognisance, and other express statutory provisions, the bail had a right to discharge himself by a surrender of his principal, any time before his liability was fixed.

It seems to be agreed on all hands, that the prescribed form of the recognisance is not altered by the act of 1821; that construction cannot be carried so far as to expunge a single letter of it.

A necessary enquiry to ascertaining whether bail be liable at all since the act of 1821, will, therefore, be, whether by that act his power to take and surrender his principal to prison is taken away, and if so, then the effect thereby produced on his responsibility.

The act is susceptible of two plausible constructions. The one, that it abolishes imprisonment for debt altogether, except under *mesne* process. The other, that it only takes away the use of the *ca. sa.* The first construction has in its aid, the title of the



PALMER  
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MERRIWETHER.

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act, which is, "to abolish imprisonment for debt," and an allowable interpretation of the third section, which applies it as well to cases of imprisonment accruing after, as to those which had accrued prior to its passage. That section authorizes a magistrate to discharge any one confined on civil process, without his making any surrender of his estate, or taking the oath of an insolvent debtor. It is difficult to conceive a reason why a person confined subsequently to the act on process, after judgment, should not receive such a discharge, as well as those confined before its passage. There is a reasonable presumption, from a view of the whole act, that the legislature intended to abolish the system of imprisonment as a means of coercion for the payment of debts, and that in taking away the *ca. sa.* it was supposed to have been done, and its only motive for allowing a defendant to be held to bail, was to prevent him from removing his property out of the state before judgment, so as to keep it here to be operated upon by a *fi. fa.* after the judgment was obtained. If the construction suggested of the third section be the true one, it is difficult to resist the inference, that such was the general intention of the legislature. For, if a defendant was entitled to his discharge the moment he was placed in custody, it would be idle to put him there, and it is fair to infer, that it was intended to prohibit his being placed there.

The other construction, however, is not without plausible grounds in its favor. The mere words of the act are certainly not very appropriate, and scarcely adequate to the total abolition of imprisonment for debt. The use of the *ca. sa.* might be denied; and the defendant still liable to imprisonment, by modes well known to the law. For instance, he might be taken and surrendered by his bail, or upon surrender by himself be lawfully committed and held in confinement.

If the first construction prevail, all modes of imprisonment, after judgment, are denied, and it would be illegal to take him under a bail piece, or to commit after a surrender. If the second

should prevail, he could be so taken and committed. PALMER

VS.

MERRIWETHER.

Under the first, bail, not fixed prior to the act, was discharged. For, according to the terms of the recognisance, the bail had a right to discharge himself, by a surrender of the principal, and if the law afterwards took away this power, it thereby absolved him from his engagement.

Under the second construction, in such case the bail would not have been discharged. For it was no part of the condition of the recognisance, that the *ca. sa.* should be used before the bail became liable. The courts, in favor of the bail, required the plaintiff to use a *ca. sa.* before he was allowed a *scire facias* or action of debt on the recognisance; and *ex gratia* allowed the bail to discharge himself by a surrender of the principal, any time before the return day of the *scire facias* returned executed. But this, both by the rule of court and our statute, was only on the terms of paying the costs of the *scire facias*. When, then, the law denied to the plaintiff the use of the *ca. sa.*, it might well have been contended, that the courts should abolish their rule, and not require the issuing of a *ca. sa.* as a necessary prerequisite to the fixing of the liability of bail.

Which of the two constructions we should adopt, if the question were open, we should be much at a loss to determine. There are many and persuasive arguments in favor of each. In such cases of doubt and uncertainty, it must ever be a source of congratulation to us, to find the responsibility of an election taken from us by our predecessors. Such is the fact here. The point was solemnly determined by this court in 1826. The first construction was then adopted, and in the case of *Holland vs. Bouldin*, IV Monroe, 150, bail entered into prior to the act, held to be discharged by it.

That such was the construction put upon the act by that case, is manifest not merely from the necessity of it in order to attain the conclusion to which the court arrived, but from the following language used in the opinion. "The argument amounts to this, that after this recognisance was acknowledged

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upon conditions disjunctive and alternative, the act has had the effect to strike out one of those conditions, (*the render of the body in execution,*) and placed it on the single condition, that the bail shall pay the money if the principal does not. From the premises that since the recognisance was entered into, *the law has rendered one of the conditions impossible*, the conclusion of law would be, that the obligation is discharged."

What is the effect of this construction on the liability of bail entered into since the passage of the act, as already stated, has been determined in the case of *Peteet vs. Owsley*. We perceive no sufficient reason for overruling that case.

To induce us to do so, it is insisted, that though the act totally abolished imprisonment for debt, except under *meane* process, and took from bail the power of surrendering the principal after judgment, it thereby rendered that condition of his recognisance illegal, and the only effect was to reduce the recognisance to the other and single condition of satisfying the condemnation of the court. We are cited to authorities to shew, that if one of the conditions of a disjunctive obligation is illegal or impossible at the time of giving it, the obligation is the same as if it contained no such condition. We do not feel the force of those authorities, or the principle they are cited to establish. They by no means serve to clear up the difficulty arising from two conflicting and irreconcilable laws. We cannot but feel great difficulty in determining, that an obligation containing two conditions, both authorized and directed by law, is, nevertheless, an obligation with only one condition, because the other is against or contrary to law. Those who use the argument may convict the law, if they will, of the absurdity of authorizing and condemning an act at one and the same moment, and still attempt to extract practical meaning from it. But we cannot consent to deprive a man of the benefit of a condition in his contract expressly authorized by law, upon the argument that such condition is illegal. When it is conceded that construction cannot alter the form of the recognisance, it seems to us the question is sur-

rendered. The bail has a right to the benefit of the whole form, and those who attempt to charge him, must find law to do it on other grounds, than that part of it is illegal.

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This argument is susceptible of another answer. It is to be found in the case of Pullerton vs. Agnew Holt, 148, which was this. *Scire facias* against bail, reciting a recognisance taken in the time of King William the third, wherein the condition was, that the defendant should render his body prisoner to the marshall of the marshalsea of our *present queen*; it was urged that this condition was impossible, and, in consequence, the recognisance single. *Led. per Holt C. J.* Where the condition is underwritten or endorsed, there that only is void and the obligation single. But where the condition is part of the lien itself, if the condition be impossible, the obligation is void. The same case is reported in 1 Salk. 172, and is cited with approbation in Comyn's Digest and other books.

That the legislature meant something is presumable. That it is our duty to ascertain its meaning, if practicable, is conceded. That it intended some liability on the part of bail is also presumable. But how, under the construction that it was intended also totally to abolish imprisonment for debt, this liability is to be ascertained, how and when it should be fixed, is as unascertainable as the quadrature of a circle. That by disregarding the form of the recognisance, any one may fashion a new species of liability according to his own fancy, is readily admitted. But so to fashion a new species of liability, without law for it, is denied to be within the judicial prerogative.

Our predecessors have said, that to effectuate the intended liability against bail, it was indispensable the legislature should have altered the form of the recognisance. The legislature has acquiesced in that determination, and supplied the omission, in a way that makes the liability of bail conform to what the court had supposed to be the general intention of the act of 1821 as to the total abolition of imprisonment for debt. We feel disposed to acquiesce also, and leave this whole matter as we found it.

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Wherefore, the Chief Justice dissenting, the judgment must be reversed, with costs, and cause remanded, with directions to enter judgment on the *scire facias* in favor of the defendant.

*Bibb*, for appellant ; *Denny*, for appellee.

Chief Justice ROBERTSON, dissenting from the majority of the court, delivered his own opinion as follows:

Present.

No peril of subjecting myself to the imputation of temerity, for dissenting from the reasoning and the conclusion of the opinion just delivered, can control my judgment or convince me that it is my duty to acquiesce in what I am constrained to consider as essentially erroneous. The error, if it exist, was not so inpregnably established by judicial recognition as to be entitled to the force of conclusive authority. The opinion in *Peteet vs. Owley*, is not intangible. It was delivered by only two members of the court; its reasoning is, to my mind, not only inconclusive, but suicidal; it has not been fortified by any subsequent decision by a full court, or even by the same learned judges by whom it was pronounced; at the session of the legislature next succeeding its promulgation, an act was passed for the purpose of supplying, in express and explicit terms, the supposed *casus omissus*, and of enforcing, as I believe, the obvious intention of the statute abolishing the *ca. sa.* by re-enacting its substance in language that could not be misunderstood or evaded. Hence "*stare decisis*," though a wise judicial maxim, when fitly applied, and always entitled to much influence, does not conclude the question now involved, nor allow me, (entertaining the opinion I do) to be content with the easy and irresponsible task of acquiescing in a doctrine once before announced by two of my predecessors, and which, after full and anxious deliberation, my judgment cannot approve as either reasonable or just, or consistent with the act of 1821.

The peculiar attitude in which I am thus placed, may render it proper that I should state some reasons for my own opinion.

As much of the act of 1821 as is material to the argument, is contained in the first and second sections, and is in these words:

"Sec. 1. All laws which authorize a *capias ad satisfaciendum* to be issued against the body or bodies of any debtor or debtors, shall be and the same is hereby repealed.

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"Sec 2. Hereafter no person or persons shall be arrested upon any *original* or *meane process*, or required to give bail, unless upon affidavit being filed with the clerk of the court or justice of the peace from which process is to be issued, stating that the plaintiff or plaintiffs verily believes that the person or persons against whom such process is about to issue, will leave this Commonwealth, or move his property out of the same, before judgment, or otherwise abscond, so that the process of the court cannot be executed, and upon such affidavit being filed, the clerk shall endorse that *bail is required*, and in what sum."

It does not seem to me to be difficult to understand this act, or to give to the foregoing two sections of it a practical, consistent, and *effectual* construction, so far as they can operate essentially on the point I am now considering. The first section repealed all laws authorizing a *ca sa* to issue. The second section provided, 1st, that no person should, in a civil case, be arrested on an *original* or *meane* process, unless he should be required to give bail in consequence of such an affidavit as it prescribed; and, 2nd, that a party, arrested upon affidavit, should give special bail, as if there had been no statutory exemption in any case, or should be imprisoned for failing to give such bail. The two sections together show that the *capias ad satisfaciendum* was abolished, but that a party might still be arrested and held to bail on a *capias ad respondendum*. And by the fourth section it was provided, that a person imprisoned for failing to give bail, might be liberated by giving the bail required, or by taking the insolvent's oath.

In *Peteet vs. Owsley* it is decided that a *capias ad satisfaciendum* could not be allowed since 1821, and, on that point, it seems to me that there is no room for a doubt, because the act of 1821 explicitly declared that such a *capias* should not, thereafter, be

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lawful, and only permitted the arrest of a debtor by his creditor, in prescribed cases, on original or *mesne* process.

The opinion of my associates, not only reposes on the supposed conclusiveness of the case of *Peteet vs. Owaley*, but intimates that the statute of 1821 is not susceptible of any satisfactory construction which would enable the court to ascertain the nature and extent of the liability of special bail, or to determine when or how that liability may be fixed and enforced. I admit that the language of the statute is not so precise and appropriate as it might have been: but it clearly shows that the legislature intended that special bail, acknowledged pursuant to its authority, should be legally liable in some event and to some extent; and, as already stated, it also clearly shows that a *capias ad satisfaciendum* could not be issued against the principal debtor; nothing more is necessary, in my opinion, for any purpose in this case.

It is immaterial whether the bail might have had a right to surrender the principal or not, because, were it admitted that such a surrender might have absolved the bail, still the creditor could not have issued a *ca. sa.* against the debtor, and was, therefore, not required or expected to do so. The recognisance is in these words:

"I, Mary Palmer, do hereby acknowledge myself *special bail* for the within named Wm. Lynn, in the suit named in the within writ."—signed, "Mary Palmer."

Did that undertaking impose any legal liability? If it did, when was that liability fixed, and how was it to be enforced? These are the only questions to be considered.

That a legal liability may have resulted from the recognisance, I think there can be no reason for a plausible doubt; and I am also clearly of the opinion that, as a *necessary consequence*, a *ca. sa.* against the principal was not necessary to the existence or enforcement of that liability.

For, as it is evident that the law prohibited such a *ca. sa.* the consequence is plain that, under *the same law*, the principal could not sustain any forfei-

ture of his right by not doing what would have been unlawful; and consequently, if the bail was not liable until a *ca. sa.* had been issued, he was not liable at all or upon any contingency. It then it can be shown that the recognizance imposed any legal obligation, it will result that the plaintiff was, as special bail, liable precisely as she would have been if there never had been any law authorizing or requiring a *ca. sa.*

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Her contract contains no stipulation requiring a *ca. sa.* to issue; and, as I will endeavor to show, no such condition can be implied, *but is clearly excluded.*

That the legislature intended to abolish all laws which required, as well as those which authorized, a *capias ad satisfaciendum*, in any case or for any purpose, is, to my mind, almost self-evident. The inevitable consequence would be, that, in 1824, the date of the plaintiff's undertaking, *there was no law requiring a ca. sa. as necessary to her liability.*

The intention of the legislature is obvious and indisputable. By authorizing a creditor to hold his debtor to bail, and even to imprison him for failing to give it, the legislature intended nothing more nor less than that in this way, the plaintiff's demand might, as before, be secured; and consequently, that the surety should be legally responsible. It would not be reasonable or allowable to suppose that the legislature, whilst acknowledging the justice of requiring a defendant to give bail or go to jail, and whilst providing a mode for securing that end, could have intended or imagined that bail, when given, should, in no event, be liable for his principal. The very act of requiring bail necessarily implies that the bail shall be responsible. As the bail is taken according to law, he must be bound according to, or by the same law, in consequence of his undertaking. His undertaking being legal—his obligation must be legal. Such is the inevitable construction of the act of 1821; and such must be admitted to have been the intention of the legislature. As a reasonable, if not a necessary consequence, it would seem to follow, that the legislature intended that, as by the act of 1821, *ca. sa.* executions were abolished, and as, by



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the same act, bail was allowed to be taken and held responsible, the legal liability, thus incurred, might be enforced without issuing a *ca. sa.* Any other supposition is inconsistent with the *declared intention* of the legislature, and would render the second section of the act of 1821, not merely a nullity but an useless mockery of justice. It seems to me that the legislature intended, when enacting the second section of the act of 1821, that special bail taken conformably to its provisions, should be liable for the debt of the principal whenever the creditor had failed to make it out of the principal, by resorting to all the means of coercion permitted by the law. One of the means within the creditor's power, before the abolition of the *ca. sa.* executions, was taken away by the act of 1821; and consequently, the only effect, as it seems to me, of the abolition of the *ca. sa.* so far as special bail is concerned, was to render him as liable without a *ca. sa.* against his principal, as he would have been after an ineffectual return upon it before its abolition.

The opinion in *Peteet vs. Owsley*, concedes that it was the intention of the legislature to hold special bail responsible, and *virtually* admits that such bail is liable, but argues—that as, before the abolition of the *ca. sa.* an execution of *ca. sa.* against the principal was indispensable to *fixing* the liability of the bail, it is yet, *though abolished*, equally necessary; and that, therefore, as a *ca. sa.* cannot issue, the intention of the legislature cannot be effectuated, nor the undertaking of the bail enforced. This reasoning is, to my mind, at least, inconclusive. It seems to be what logicians denominate an enthymeme—or an imperfect or delusive syllogism. It is, in effect, this—“that as the *ca. sa.* was necessary to fix the liability of bail, when the law authorized it to issue, it is equally necessary now, when the law forbids it.” I cannot feel the force of this reasoning. I cannot thus acknowledge a statutory right without any remedy. I could not admit that the same statute, which gives a right *expressly*, takes away *constructively*, all remedy for enforcing it. The acknowledged and undeniable *intention* of the legislature should be sufficient answer to the reasoning in

**Peteet vs Owsley.** The intention of the legislature is its *will*; and its will, when constitutional, is *law*. If the legislature intended that a special bail should be liable without a *ca. sa.* then, *by law*, he is so liable; and that such was the intention of the legislature when it enacted the act of 1821, cannot, I think, be reasonably doubted. It was not necessary that the act of 1821 should provide any remedy. It has given a legal right, and the pre-existing remedy by *scire facias* still exists, and is appropriate.

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Here I might close this dissent. But an answer more direct and perhaps satisfactory, may be given to the argument in *Peteet vs. Owsley*. It will be found in the reason of the old doctrine which required a *ca. sa.* against the principal in order to fix the liability of the bail. The liability of the bail resulted from a *breach of an express condition* in his undertaking. As special bail was only a collateral security, the law would not subject him to liability until all the means of coercing the principal had failed; and therefore, the undertaking of the bail was, *in express terms*, that, if the creditor could not make his debt out of the principal, he (the bail) would either pay it for him or secure to the creditor the legal means of coercing him; and consequently, when the *ca. sa.* was a legal remedy, the undertaking of a special bail expressed that, if the principal should fail to pay the debt or to surrender himself in custody of the law, the bail would pay the debt for him, or would surrender him to any *ca. sa.* which might be issued. There could be, therefore, no breach of the contract by the bail, until after a *ca. sa.* had been issued against the principal, because, according to an express condition in his recognisance, he had a right to discharge himself by surrendering his principal. Cro. Ch. 481; 1 Lord Raym'd. 156; 11 Sanders, 72, n. n. 4; 11 Tidd's Pra. 993; 11 Johnson's Reports, 509.

Speaking of the reason why special bail was liable as soon as *non est inventus* had been returned on a *sa. sa.* against the principal and not sooner, Jacob says, "For they (the bail) stipulate in this triple alternative, that defendant shall, if condemned in the suit, satisfy the plaintiff his debt and costs, or that

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he shall surrender himself a prisoner, or that they will pay it for him. As, therefore, the two former branches of the alternative are neither of them complied with, the latter must immediately take place."

VI Ja. Law Di'y, 26. A return of *non est inventus* on a *ca. sa.* against the principal, fixed the liability of the bail. But although, *ex debeto justitiæ*, the bail could not be entitled to an exoneration by a surrender of his principal after one *ca. sa.* had been returned without effect, nevertheless, *ex gratia*, a practice obtained which entitled the bail to relief by a surrender of the principal at any time before a return of two *nilis* on the *scire facias*; and this practice was legalized by a statute of this state.

It is thus manifest that the only reason why a *ca. sa.* against the principal was originally necessary to fix the liability of the bail, *de jure*, was because it was required by an express condition in the recognisance. The bail was not, according to an express stipulation in his contract, responsible until a *ca. sa.* had been issued against his principal; and he had the right, expressly reserved, to surrender him in custody and thus exonerate himself.

A Virginia statute of 1761, prescribed the form of a recognisance by special bail. It was alternative and substantially such as that described by Jacob. In 1810, a statute of this state dispensed with appearance bail, and changed the ancient form of recognisances by special bail. The recognisance prescribed by that statute is general, and simply acknowledges that the cognisor *has become the special bail of the defendant*. But before the abolition of the *ca. sa.* the construction and effect of such general recognisances were precisely the same as if they had been as formerly, expressly alternative. By merely altering the form, the legislature did not change the nature or effect of the contract of special bail; and consequently, as a *ca. sa.* was still one of the legal means of coercing the principal debtor, the right of the bail to surrender the principal was implied; and he was not, of course, liable until after a *ca. sa.* had been returned.

But the *ca. sa.* had been abolished before the appellant became special bail. Her recognisance is

general, and contains no condition requiring a *ca. sa.* to be issued, or entitling her to exoneration by the surrender of her principal. *And no such condition can be implied by law or supplied by construction.* Such an implication or construction would be contrary to the understanding of the parties and inconsistent with reason and law. When the appellant became special bail, she must be presumed to have known that no *ca. sa.* could be issued against her principal. She did not, therefore, intend to be liable *only* in the event of that being done which she knew was legally impossible. She knew that she would not have the right to exonerate herself by surrendering the principal; and of all this she was notified by the very statute which legalized the act of requiring bail, and under which she became bound. *According to that law her undertaking must be construed; and what effect did that law give to it? Certainly no other or less than that, if the creditor should fail, by legal means, to make his debt out of the principal, she would pay it.* She, by her collateral undertaking, released her principal from imprisonment, and enabled him to remove himself and his property, if he had any, beyond the jurisdiction of the court in which he was sued. And if she be not responsible because the creditor has not done that which he never undertook to do, and which the law forbid, it would have been better for him that bail had not been required, and the statute which authorized it was worse than a nullity. She cannot now say that the whole proceeding was mere form and parade, intended only to exhibit an idle farce; such was not the object of the law; such was not her contract when construed according to law or reason. Her contract was statutory, and must be regulated by the import, design, and effect of the statute: that forbid a *ca. sa.* consequently her contract did not require that one should issue, but, if it had any obligation or effect, rendered her liable without one. The only reason why, prior to 1821, special bail was not liable until a *ca. sa.* had issued, was that, the undertaking of the bail was on either an express or an implied condition, that one should be issued. But, as since 1821, a *ca. sa.* execution could not be issued,

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there could be no such implied condition in the obligation of bail. The only reason for the old doctrine, then, fails in this case; and I suppose that the reason ceasing, the law also ceases; and that, as a necessary consequence, the liability of the appellant was fixed when the creditor, by issuing a *fiert facias*, which was returned "no property," had done all that the law permitted him to do, or that her contract, according to its legal import, required him to do. I feel authorized, therefore, to conclude that her undertaking is obligatory, and consequently, that she was liable without a *ca. sa.* against her principal; for such an alternative as that implied in the undertaking of bail, when a *ca. sa.* could be issued, could not have been intended by her, or implied by the law which expressly interdicted any such process. *Her recognisance entered into under the act of 1821, cannot be construed to require any thing prohibited by that act.*

But if her undertaking had been *expressly* in the alternative, as it would have been, constructively, prior to 1821, the obligation would have been, nevertheless, valid without the issuing of a *ca. sa.*; because the legal effect of her contract would have been simple; the superfluous stipulation for the surrender being illegal and inoperative.

It has been decided that a special bail, whose recognisance was acknowledged prior to the abolition of the *ca. sa.* and was, of course, *constructively* in the alternative, and entitled the bail to exoneration by the surrender of the principal, was released from liability by the abolition. See *Holland vs. Bouldin*, IV Monroe, 148. This is unquestionably sound law, if the power of the legislature to deprive bail of the right of surrendering the principal be conceded; because, in a *disjunctive contract*, all the undertakings or conditions being lawful, if one of them become impossible by operation of law or by the act of the obligee, the obligor is thereby discharged; V Coke, 22 a; Ba. ab. condition M; Com. Dig. condition D.

But the same authorities and the same reason show that if one of the conditions of a *disjunctive or alterna-*

tive contract be impossible at the date of the contract, the obligation is precisely the same as it would have been if the contract had not contained the impossible stipulation. See also Cro. Ele. 780; Com. Dig. condition L. 12; Ba. ab. condition 2.

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If then the recognisance of the appellant had expressly contained an alternative condition that she might discharge herself by the surrender of her principal, as that condition was impossible at the date of her acknowledgment, the legal effect of her contract was single, to-wit: that she was bound to pay the debt if it could not be made out of the principal by legal means. She could not object that the abolition of the *ca. sa.* has deprived her of any right, because when she undertook to be special bail, the law did not permit the surrender of her principal, and therefore, nothing has been rendered impossible by law or by the act of the appellee, which was legally possible at the date of her contract.

This doctrine proves that the appellant's liability is not destroyed or impaired by the abolition of the *ca. sa.* in 1821. It proves that if her contract had contained an express condition for the surrender of her principal, she would have been liable without a *ca. sa.* against him; and that, therefore, even if her undertaking could be construed as containing such a condition, she is liable although no *ca. sa.* ever was or could be issued against him. But it tends clearly to show also, that her undertaking could not, by construction, contain any such condition, and that she was, of course, liable on the return of the *feri facias*, even if she would not have been so liable had her contract contained such condition.

Before the abolition of the *ca. sa.* it was generally necessary that an assignee, before he could have legal recourse to his assignor, should have issued a *ca. sa.* against the obligor. This was one of the implied conditions in the contract of assignment. Has the assignee now no right to call on his assignor, because he did not issue a *ca. sa.* against the obligor since its abolition?

Why has he such right? Because, as the *ca. sa.* has been abolished, he has, by issuing a *feri facias*, done

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all that the law permitted him to do. So, although prior to 1821, special bail was not liable until after a *ca. sa.* had been issued against the principal, he is now, like the assignor, liable upon a return of no estate on a *feri facias*.

Without amplifying more, I feel bound to conclude that the only reason given in the case of *Peteet vs. Owsley*, is not only inconsistent with the conclusion which was deduced from it, but is irreconcilable with the reason and law of this case.

It has been shown, I trust, that a recognisance entered into since the abolition of the *ca. sa.* cannot be construed as containing any such condition for the benefit of the bail, as that he may surrender his principal; and that, therefore, the issuing of a *ca. sa.* could not be necessary to the liability of the bail. And it has also been shown that if the recognisance had contained any such condition, the bail would still be liable without a *ca. sa.* The consequence is that nothing is contained in or omitted by the act of 1821, which can make the liability of the appellant depend on the issuing of a *ca. sa.* against her principal. This conclusion seems to me to accord with the intention of the legislature, with reason, and with authority; and thus the second section of the act of 1821 would be not a dead letter, but would have a practical, consistent, and effectual operation; and thus a beneficial act of the legislature would not be nullified, but would be permitted to operate according to its declared object and design. I concur with the court below.

Wherefore, as I cannot, for the foregoing reasons, concur in recognising *Peteet vs. Owsley* as a conclusive authority, I have deemed it my duty to dissent from it, how much soever I may respect the distinguished jurists who decided it, or my associates, who acquiesce in its authority.

But, whatever I may think, I shall hereafter feel it my duty to consider the question here discussed, as now settled, finally and conclusively.

**White vs. Graves &c.**

Error to the Fayette Circuit; H. KEY, Judge.

CHANCERY.

Case 159.

*Deeds of trust. Secret trusts. Insolvent debtors. Preference of creditors.*

Judge NICHOLAS delivered the opinion of the court.

October 16.

H. GRAVES conveyed all his estate, real and personal, to Edmund P. White, in trust, to sell the same, and with the proceeds satisfy certain debts due from Graves to John White, and to indemnify the latter against certain liabilities he had incurred as the surety of Graves. Among other property so conveyed, there was a tract of land, which it was stipulated by the deed Graves should have the privilege of selling himself on or before a named day, by private sale, provided the bonds taken for the purchase money should be assigned to Edmund P. White, to be held by him for the purposes of the trust. At the time of taking this deed, Edmund P. was acting as the agent of John White for the purpose of obtaining security and indemnity for Graves. In addition to the stipulations contained on the face of the deed, it was verbally agreed between E. P. White and Graves, that out of the proceeds of the sale of the land to be effected by the latter, he was to be permitted to retain \$1000 of the sale money to be applied to his own use or for purposes other than those expressed in the deed. Shortly after the date of the deed, the land was sold by Graves and \$1000 of the proceeds retained by him with the assent of E. P. White. At the time of executing the deed, Graves was in failing if not insolvent circumstances, with heavy debts against him then due, some of which were in suit, and on which judgments were obtained recently thereafter.

This deed of trust was attacked by appropriate proceedings on behalf of the other creditors of H. Graves, and the balance of the property embraced by it having been sold by order of the circuit court, the deed was treated as fraudulent and void, and the proceeds applied, by final decree, to the satisfaction of those other creditors, to the prejudice of White, his claims being postponed till theirs were satisfied.



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The decision of the case here depends mainly upon two questions. First. Whether the deed of trust was fraudulent and void as to the other creditors of Graves; and if so, then, secondly, whether White should have been paid, *pro rata*, with the other creditors, or whether his debts should have been postponed as was done by the circuit court.

As to the first of those questions, we shall only notice one objection out of many that have been made to the validity of the deed. It is the effect of the secret agreement, not expressed on the face of the deed, to permit Graves, the grantor, to retain \$1000 of the purchase money for purposes other than those expressed in the deed. Does this of itself render the deed, in contemplation of law, fraudulent and void?

So far as we know, the exact point has not been adjudged, but it falls so entirely within the operation of well settled principles, that there can be but little difficulty in coming to a correct determination of it.

In conceding to a debtor, the right of preferring one creditor to another; by pledges of, or liens upon, his property, the law has yielded him a power greatly liable to abuse, and which, apart from the necessity of such power in the transaction of business between men in their commercial relations, it would be difficult to defend on mere principles of equity. "The property of a debtor is that upon which he obtains credit, is that to which his creditors look for payment, and upon which they all have an equally equitable claim for remuneration." When the chancellor gets hold of the fund, he always makes equal distribution among the whole of the creditors according to the amounts of their respective claims, unless prevented by specific liens, priority obtained by superior diligence or other controlling circumstance. To disturb this equitable order of distribution, is to interfere with the rights of general creditors; and the law, therefore, whilst it permits it to be done, looks with great jealousy upon the manner of doing it. Whilst it allows the debtor to prefer a favored creditor, it requires in the mode of doing it all fairness and good faith. It denounces all departures from either. In its anxie-

ty to prevent an abuse of this power, and to preserve these transactions pure, it requires that they should truly speak what they profess to be. That whilst professing merely to confer an allowed preference on one creditor, they should not covertly secure an advantage to the debtor himself to the prejudice of other creditors. It discountenances all secret trusts and confidences, for procuring to the debtor ease and favor, as against his other creditors. Such is the odium with which it views such secret trusts, that the law has even devised and brought to its aid artificial, arbitrary rules for their ascertainment and detection. Possession retained by the grantor in cases of absolute conveyance of land, is said to be evidence of fraud, by reason of its being a strong indication of a *secret* trust and reservation. Roberts, 555. "A leading object of the statute against fraudulent conveyances must have been to prevent those collusive transfers of the legal title, which, placing property out of the reach of creditors, leave to the debtor the beneficial enjoyment of that which ought to be left open to their legal remedies."

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In the case of *Riggs vs. Murray*, II John. Chy. 576, after a full review of the authorities, it was determined that, a power of revocation reserved by a debtor in assignment of his property to pay certain creditors, renders the instrument fraudulent and void as to other creditors. It is there said, the necessary inference from such a reservation, is, that the transfer was made to hinder, delay and defraud creditors. There the reservation was on the face of the deed. It spoke truly the whole arrangement between the parties. Here there is a similar reservation, existing in parol, not expressed in the deed, but in direct repugnance to its provisions. This case is, so far, the stronger of the two against the deed. That there was a secret trust for the benefit of the grantor, contrary to the agreement as expressed in the deed, must always be a controlling circumstance on the question of fraud, if it does not, *per se*, render the conveyance void.

Deed of trust by an insolvent debtor, by which he conveys all his estate, real and personal, to be sold for the benefit of *one* of his creditors, with a *secret* parol agreement between him and the creditor that part of the money for which the property might sell, should go the debtor, decided to be *fraudulent*.

The effect of the deed in this case, if it had been valid, would be to save the property from immediate sale, under execution, by the other creditors.

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They would, however, still have a right to the equity of redemption, and could have secured the benefit thereof by a levy of their executions. If the secret agreement were permitted to prevail, this right would be thereby abstracted from them to the amount of \$1000. A debtor cannot be permitted thus to withdraw his property from his creditors and appropriate it his own use. A creditor cannot be allowed to gain a preference over other creditors, in consideration of such secret trust.

Where a creditor has endeavored to obtain a fraudulent preference over the other creditors of an insolvent debtor, by having procured a conveyance to himself of all the debtor's property, and the other creditors have obtained a decree setting it aside as null and void, his claims should be postponed till the other creditors are satisfied.

As to White's claim to be paid, *pari passu*, with the other creditors out of the proceeds of the property, we think it was properly rejected by the circuit court. After a creditor has endeavored to obtain a fraudulent preference over the other creditors of an insolvent debtor, by a transfer of the whole of the debtor's property, and those creditors have obtained a decree setting it aside as null and void, we do not think the chancellor ought to hear his claim until the others are first satisfied. It has ever been the policy of the courts to discourage, as far as in them lay, these fraudulent shifts and devices, on the part of debtors, to screen any part of their property from the payment of their just debts. To effectuate this wise policy, it is indispensably necessary to deter any portion of the creditors from aiding and assisting these shifts and devices, by lending to them the cloak of their names and *bona fide* demands. Nothing will be better calculated to do this, than declaring such aid and assistance to amount to a disfranchisement of their right to a full and equal participation in the proceeds of the property so attempted to be secreted. A contrary doctrine would hold out a temptation, with which it would be unwise and impolitic to tempt the morals of the community. A creditor would be much more likely to assist in these arrangements, where he might gain, but could lose nothing, than where he incurred the hazard of losing his whole debt.

The fact that this arrangement was made for White, by another, and not himself, cannot better his situation. He must be considered as having adopted and confirmed what his agent did. He certainly never disaffirmed his acts. Though the agent

had no authority to make such arrangement, and though White may not have known it until disclosed in the progress of the cause; yet, since that disclosure, he has persisted in asserting his rights under the deed of trust, and ever since the decree of the circuit court vacating the deed on that very ground, he has again, in this court, reasserted his right by virtue of it, and insisted upon the priority which it gave him over the other creditors.

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vs.  
GRAVES.

In the case of Yoder vs. Standiford, [VII Mon. 490, it is true that Yoder was allowed his debts notwithstanding the sale and conveyance, under which he claimed, were declared fraudulent and void. Yet it is plainly intimated, that if the whole court had acted upon that point in the case, the decision would have been different. Judge Owsley, whose opinion produced the result in Yoder's favor, thought that after the destruction of the sale and conveyance, Yoder had a right to fall back upon his judgments and executions which were untainted with fraud, and retain the priority which he held by virtue of a levy under them. Here White has no lien whatever on the property, except by virtue of the deed of trust. Without, therefore, expressing any opinion as to what we would think of a case circumstanced like that of Yoder vs. Standiford, we shall content ourselves with saying that this is clearly distinguishable from that, and not to be governed by it.

We feel more confident in the propriety of postponing White's claim, from the circumstance that he was the party who first brought this whole subject before the chancellor, by obtaining injunction against most of the other creditors, restraining them from proceeding, on their executions against the slaves and personal estate embraced in the deed of trust, and from the additional fact, that all the other creditors have judgments or decrees against Graves, and that he has none.

The decree must be affirmed, with costs.

*Haggin and Cowan*, for plaintiffs; *Chinn*, for defendants.

## CHANCERY.

## McConnell vs. Hanley.

Case 160.

Appeal from the Jessamine Circuit; KELLEY, Judge.

*Attachment. Lis Pendens. Lien.*

October 17. Chief Justice ROBERTSON, delivered the opinion of the Court.

JOHN H. HANLEY and William Lewis, being co-sureties, for an insolvent principal in replevin bonds for a large sum. Hanley, apprehending that Lewis would become insolvent before the bonds would become payable, and hearing that an agent of Lewis was in the act of taking to Arkansas or Texas about twenty slaves for the purpose, as is supposed, of imposing upon him (Hanley) the whole burthen of the replevin bonds, attached the slaves in Mercer county, by an order of a chancellor, upon a bill filed in the Mercer circuit court.

Lewis having failed to execute such a bond as the restraining order required, the slaves were retained, pursuant to the order, in the custody of the sheriff.

Lewis lived in Jessamine, and the subpoena was served on him in that county. He relied on that fact as an objection, which, by plea, he made to the jurisdiction of the court. During the pendency of that suit in chancery, and before Hanley had discharged the replevin bonds, William McConnel (a judgment creditor of Lewis) procured a *feri facias* on his judgment to be levied on the slaves in the custody of the sheriff under Hanley's restraining order. Some of the slaves were sold under that execution, and Hanley, advised (as he says) that his only mode of securing the possession was to buy the slaves at the sheriff's sale, bought some of them, and gave a sale bond for the price. To enjoin the enforcement of that bond, he filed a bill in chancery, relying chiefly on the foregoing circumstances for a cancellation of the obligation in consequence of a supposed want of consideration. Upon the hearing of the case on bill, answer, and exhibits, the circuit court perpetuated Hanley's injunction, and that decree is now complained of by McConnel.

We cannot sustain the decree.

1st. If the jurisdiction of the Mercer circuit court be conceded, and it be admitted, as a consequence of the *lis pendens*, that Hanley had a lien on the slaves, nevertheless that lien was remote and contingent. How much more than his moiety of the joint debt Hanley would be compelled to pay, or whether Lewis would voluntarily indemnify him by a just contribution, was uncertain. It was also uncertain whether he would ever obtain a final decree for enforcing the lien. He made no reservation of his lien at the time of the sale under execution, or when he executed his sale bond. Whatever may have been Hanley's intention, therefore, his acts must be deemed an implied waiver of any lien that he had.

2nd. The suit in chancery in Mercer had not been disposed of when the decree in this case was rendered, and we have no means of knowing to what extent the *lis pendens* should be deemed to have operated, or to what extent the lien, supposed to have resulted from the pendency of the suit in Mercer, shall ultimately be ascertained to be available, or how far its enforcement may become necessary to Hanley's indemnity.

Wherefore, the decree of the circuit court is reversed, and the cause remanded, with instructions to dissolve the injunction, with damages, and dismiss the bill with costs.

*Hewitt*, for appellant ; *Mayes*, for appellee.

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BEAUCHAMP.

Property is attached at suit of complainant, and *lis pendens* he purchases the same property at a sale under an execution in favor of a third person against the defendant, and executes a sale bond for the price, decided, under the circumstances, that his subsequent purchase was a waiver of his lien acquired by the *lis pendens*, and must pay off the sale bonds executed by him.

## Underwood and Beauchamp, Trustees, CHANCERY. vs. Crutcher.

Error to the Warren Circuit ; BRODMAX, Judge.

Case 161.

*Bill by elder patentee to compel junior patentee to release his title. Removed certificate. Statutes. Settlement. Jurisdiction.*

Chief Justice ROBERTSON delivered the opinion of the Court. October 15.

THIS writ of error is prosecuted to reverse a decree dismissing a bill in chancery filed against the defendant (Crutcher) by the plaintiffs, (Underwood and Beauchamp) as trustees for T. B.

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Monroe, alleging that they hold the elder legal title to a tract of land in the occupancy of their tenant, (Haydon) and to which tract, or a portion thereof, the defendant asserts a claim, under a junior grant.

They exhibit a regular deduction of a legal title to themselves, purporting to have originated under the head right laws, and to be founded on removed certificates, surveyed and carried into grant in 1815, and pray for a decree compelling the defendant to relinquish to them his claim.

The defendant relies on a survey purporting to have been made in April, 1800, on a removed certificate granted under the head right laws prior to that time, and exhibits a copy of the survey, and of a patent issued thereon, since the date of the grants under which the plaintiffs claim to hold. Upon these alone, without any other document of title, he insists that the title of the plaintiffs is invalid—that his own is good and paramount in equity at least—and that the locations made in 1815 were illegal and void, so far as they encroached on his survey, which, as he contends, was protected by the 12th section of an act of 1808, II Dig. 773, which declares that, “from and after the passage of this act, no removed certificate shall be located on any survey made by virtue of any certificate heretofore granted,” and by the 5th section of an act of 1801, II Dig 754, which declares that, “no claims granted under any law passed prior to the year 1800, for granting relief to settlers south of Green River, where the same is surveyed and a plat and certificate thereof returned to the Register’s office, shall be affected by any claim originated under the act of December 20, 1800, entitled, ‘an act for settling and improving the vacant lands of this Commonwealth,’ or any law that may be hereafter passed.”

The plaintiffs insist that the defendant’s survey should be deemed void, because he has exhibited no certificate of settlement or of re-location.

The boundaries of the two claims are sufficiently identified to show that they conflict with each other; but there is no proof that either party, or any person under whom either claims, was ever actually.

settled on the land, or any part of the land contained in either of the grants. UNDERWOOD &c.

The plaintiffs' two surveys, both made in 1815, purport to have been on entries made in the surveyor's office on removed certificates; one of the entries was made in 1815, the other was made in 1801, and so amended in 1815, as to interfere with the defendant's survey. They will both be, therefore, considered as made in 1815. Vt. CRUTCHER.  
Entry materially amended, takes date from amendment.

In the case of *Monroe vs. Walker*, 11 Marsh. 402, this court decided that a location made on a removed certificate, which had been granted by a county court, since the 20th of December, 1800; will be illegal and void unless, like the original, it shall have been made in, and certified by the county court. The second section of the act of 1804, 11 Dig. 759, authorizing the removal and re-location of certificates, applies evidently to such certificates as had been granted by commissioners prior to December 20, 1800, as well as to such as may have been granted by the county courts since that time; and therefore, according to the doctrine settled in *Monroe vs. Walker*, it is not material to enquire (had we even the means of ascertaining) whether the certificates, under which the plaintiffs claim, were granted by commissioners or by a county court; because the locations, as exhibited, seem, *prima facie*, to have been made since 1804, and with a surveyor instead of a county court. The entry made prior to 1804, but afterwards withdrawn, and in 1815 amended so as to interfere with the defendant's survey, must, so far as it interferes, be deemed to have been made in 1815, and not before. Therefore, without enquiring into the right to have withdrawn and amended the entry, the authority of the case of *Monroe vs. Walker*, and the act of 1804, applied according to its obvious import, seem to denounce the entries made with the surveyor in 1815 as illegal and void. Location made on removed certificate, granted by county ct. since 20th Dec. 1800, illegal and void, unless made with the county court; entry with surveyor not sufficient. Effect of second sec. of the act of 1804, 11 Dig. 759.

The locations, as made with the surveyor, having been exhibited, and no county court certificates having been shewn, we are not allowed to presume that locations on removed certificates were made according to law, in the county court; nor could we, with- Court will not presume location to exist which is not shewn.



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The entry  
void, it does  
not follow  
that the pa-  
tent issued  
upon it is  
void.

I Dig. 221,  
person having  
legal title and  
possession  
may maintain  
bill to compel  
relinquish-  
ment by jun-  
ior patentee.

Comp't with  
mere patent  
on void entry  
cannot have  
decree for  
"repose" vs.  
def't, who has  
survey and  
junior patent,  
unless defen-  
dant's claim  
be void.

out seeing such locations, ascertain whether or not the surveys were made conformably to them (even if they exist.)

But though the entries may be void, the patents are not necessarily so also. A patent, when attacked incidentally (as in this case,) cannot be declared void unless it be procured by *actual* fraud, or had been declared void by the law, or be void on its face. *Atchley vs. Latham*, II Litt. 363; *Jennings et al. vs. Whitaker*, IV Mon. 50.

According to the established construction of the act of 1796, I Digest, 221, authorizing "any person, having both the legal title to and possession of land," to maintain a bill in chancery for a relinquishment, by any adversary claimant, the elder grant, unless void or fraudulent, may, without any extraneous proof of equity, entitle a complainant under that statute to relief. Consequently, had not the entries of 1815 been exhibited, the plaintiffs might, without doubt, have been entitled to the relief sought by their bill, unless the defendant had shewn a right which should overreach their patent. But if they have shewn that they have no equity, can they be entitled to a decree merely because they have the elder legal title? They may, according to the interpretation of the act of 1796, if it appear satisfactorily that the claim of the defendant is void. Unless the court can be authorized to declare the defendant's survey void, the patent of the plaintiffs, though not void, will not entitle them to a decree compelling him to surrender his claim to them. The defendant's claim belongs to a peculiar class, dependent on peculiar rules.

If it appear that the defendant has no title, the plaintiffs being valid, and vesting in them the legal title, will entitle them to a decree for repose from annoyance by his claim. But, as he has a patent founded on a survey purporting to have been made in April, 1800, the acts of 1801 and of 1808 so far protect him against their patents that, standing as complainants on void entries, they cannot obtain a decree against him unless it be the duty of this court to *presume*, as it is now asked to *presume*, that his survey is void.

The defendant's right must be tested by the laws in force at the date of his survey. At that time the county courts had no authority to grant certificates of settlement or of locations on removed certificates; and it is evident, that none of the acts of assembly required or authorized commissioners to give certificates of location on removed certificates. Not only did no act of assembly give such a power or even allude constructively to its exercise, but it was impossible for commissioners to exercise it in 1800, when there was no legal provision for their action or creation. All that was required in locating a removed certificate, in 1800, was that the holder should have shewn to the county court that he had a legal right to remove his location, and, producing a certificate of that fact, have made a location in the surveyor's office.

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In April, 1800, county court had no authority to grant certificate of settlement or location on removed certificates.

The third section of the act of 1799, II Dig. 748, under which the defendant's survey was made, did not authorize the county courts to give certificates of location. That power was vested in them for the first time by the act of December 20th, 1800. This not only results from a consistent and practical construction of the prior acts of assembly, but may be inferred to have been the opinion of this court in the case of Monroe vs. Walker, *supra*. A county court certificate of location on the removed certificate was, therefore, not necessary to the validity of the defendant's survey.

This section act of 1799, II Dig. 748, did not authorize county courts to give certificates of location. That power given 20th December, 1800.

Nor was notoriety, absolute or constructive, in the calls of his entry, indispensable to the security of the defendant's survey. That survey was made under a peculiar statutory system, that is, the Head Right laws, in force prior to the institution of the county court system, more comprehensive and permanent, and therefore more careful and exact in its requisitions. The two systems are, in some respects, essentially distinct and different. Monroe vs. Walker, *supra*. The first (or commissioner system) only required the commissioners to give a certificate of settlement right "describing particularly the bounds of the land agreeably to the location handed into the court by the person claiming the same." The last (or county court system) required a certificate from the

Notoriety not required under the Head Right laws authorizing commissioners to grant certificates of settlement. Difference between the commissioner system and county court system.

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county court containing "a special location describing, as accurately as may be, the land contemplated." The first only required the holder of a removed certificate to make "an entry" in the surveyor's office; the last required a county court certificate of the special location describing the land as accurately as the law required the county court to describe a certificate of settlement.

Fifth sec. of the act of 1801 intended to secure surveys made prior to the act, under the commissioner system, as made under the county court system, unless void.

In speaking of locations on removed certificates under the county court system, this court said, in *Monroe vs. Walker*, "if the surveyor is allowed to receive an entry without a certificate, he has no rule to go by—the certificate does not exist to guide him—and the acts have prescribed no rules by which such an entry should be made or measured." In the same case the court used the following language—"the court has been satisfied that the claims granted previous to the year 1800, usually called commissioner's certificates, depend on their own peculiar laws, and are not to be blended with the county court system further than the express words of particular subsequent laws may have blended them."

We have already suggested how far the two systems were blended prospectively by the act of 1804. But the defendant's survey is not affected by the act of 1804. Then it seems to us that, prior to the adoption of the county court system, the Head Right law did not require any other description in a location than such as might be essential to identity. Notoriety seems not to have been required until a more extended system was adopted by the act of December 20th, 1800.

It also seems to us to be fairly inferrible, that the legislature did not intend that any survey, made by authority of any Head Right law prior to the date of the act of 1808, whether conformable to entry or not, should "affected" by any location of a removed certificate made after that time; and that the object of the 5th section of the act of 1801 was to secure, as made prior to the date of that act, all surveys on claims originating under the commissioner system against all claims originating under the county court sys-

tem, provided the surveys thus made under the first system, or prior to the date of the act of 1800, had been authorized by law, or were not, in other words, void. If such be not the true construction and effect of those statutes, the enactment of them was a work of supererogation; for if they were intended to embrace only such surveys as had been made conformable to location, or to protect them only so far as they had been so conformable, these statutes can have no practical operation, because, had they never been enacted, such surveys would, to the same extent, have remained perfectly secure.

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If the defendant's survey was made in consequence of a legally removed certificate, it is our opinion that it should be deemed to be a survey "by virtue of a certificate" granted prior to 1808, and that his claim should be deemed a "claim granted by a law passed prior to the year 1800," because it "originated" from such a certificate and was "granted" or "allowed by such a law; and because, also, it was evidently the intention of the legislature to give to claims originating prior to the county court law of 1800 a preference over claims originating under that law; and we have a right to infer that in authorizing the removal of certificates, the legislature intended that the holder should not be prejudiced, but that his removed location should possess all the dignity of his certificate.

If, then, the defendant's survey was made on a legally removed certificate, the exhibition of an entry was not necessary for the purpose of shewing a conformity of the survey to its calls, and the defendant's claim would be protected by the act of 1808, and probably by that of 1801.

Upon deſt  
exhibiting  
survey and  
patent under  
the Head  
Right law,  
court will  
presume a re-  
gular certifi-  
cate and en-  
try.

But the plaintiffs insist that, as the defendant has not shewn, by some proof direct and express, that he had a certificate of settlement and had it removed according to the act of 1799, and as he has not exhibited any entry, his survey should be deemed and treated by this court as illegal and void. We do not think so. We should rather presume that the surveyor and register acted legally, and certified the truth and nothing but the truth; and that, therefore;

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these were a regularly removed certificate and an entry, and that the survey and patent are not false and void. This court has presumed from a survey and patent, that there had been a warrant. Hart's Heirs vs. Young, 31 J. J. Marshall, 408.

Where complainant exhibits a want of equity independent of patent, defendant need not exhibit his entry in such case as the present, because it is not in comparison of equities, and his survey is protected by the acts of 1801 and 1808, though it does not correspond with his entry.

The patent itself, containing the recitals which it does, is, according to rational and legal presumption, *prima facie* evidence of an intrinsic equity. That alone would not, however, be sufficient, in an ordinary case, in opposition to an elder grant. But this is a peculiar case, and depends on peculiar and anomalous laws. The plaintiffs, by exhibiting the entries of 1815, have shewn, *prima facie*, that they have no equitable right independent of their patents. The exhibition of the defendant's entry is not necessary, as it might be in an ordinary case, to prove the relative character and effect of his equity when competing with an elder legal or a subsisting equitable right; because the laws of 1801 and of 1808 may protect him even though his survey and his entry may not correspond. If the attitude of the defendant had been transposed, and he had, by an original or cross bill, asked a decree compelling the plaintiffs to relinquish their legal title, (perhaps) the chancellor might have required him to have established a valid and superior equity by other and more direct and unquestionable proof than any which he has furnished.

Bill dismissed  
and parties  
referred to  
the law.

But standing on defensive ground, with his survey and patent, and the acts of 1801 and 1808 in his hands, resisting a prayer for a surrender of his claim to the plaintiffs only because they happen to have older patents founded on void entries, we are of opinion that the presumptions of law are so far in his favor as to justify the chancellor in declaring, as he has done to the parties by the decree, "*I will not, in such a case, interfere, but will, by dismissing the bill, leave you and your claims in statu quo antelitem*, except that the plaintiffs will not be allowed to bring another bill for the same purpose." This is, we think, as much as the plaintiffs have a just right to ask, or expect, from the facts as presented to this court.

If the defendant shall hereafter become an assail-

ant, and ask the chancellor to help him to deprive the plaintiffs of their legal title and of their possession, (if they have the possession) then the parties may have an opportunity of investigating their relative rights in a manner more scrutinizing, certain and effectual than that which the record in this case exhibits. Until then, they must stand as the decree of the circuit court placed them, out of the pale of the act of 1796 authorizing such suits as this in prescribed cases.

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We do not feel authorized to declare that the defendant's survey is void, without any fact from which such a deduction could be made according to a dictate of reason or a principle of equity ; and if it be not void, the plaintiffs have no right to the decree sought in their bill. More especially, as Mark Hardin, who made the entries in 1815, was then acquainted with the boundaries of that survey, and intentionally encroached upon them.

If there was no original certificate, or if that certificate was not removed by authority of law, or if there was no entry, the defendant's survey may be void. But, in the face of the recitals in the survey and patent, and of the presumptions thence resulting, we cannot, in the absence of proof or of circumstances tending to create even a suspicion of fraud or imposture, presume, against the defendant and in favor of the plaintiffs, in such a case as this, that the defendant's survey was illegal and void and his patent fraudulent. Consequently, the plaintiffs have failed to shew, that they are entitled to the extraordinary relief sought by their bill.

Court will  
not presume  
against recitals in survey  
and patent  
that there  
was no regularly removed  
certificate  
and no entry.

Wherefore, the decree of the circuit court must be affirmed.

*Mnroe, Brown and Morehead, for plaintiffs ; Crittenden, for defendant.*

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CHANCERY.

**H. and J. White vs. Bates,  
and  
H. and J. White vs. Bates, Garrard &c.**

Case 162.

Appeal from the Garrard Circuit; BRIDGES, Judge.

*Possession, actual, constructive. Patents. Entry upon interference, by junior patentee, senior patentee in possession, not within interference. Act of limitation of 1809. Possession by tenant. Landlord's possession.*

October 16,

Judge UNDERWOOD delivered the opinion of the court.  
Chief Justice Robertson did not sit.

THESE causes were consolidated in the circuit court. They will be decided together here. The subject of controversy is a small triangular piece of land, considered of great value in consequence of its approximation to the salt well of the appellants on Goose Creek, in the county of Clay.

The appellants claim the land in controversy in virtue of a patent founded on a seminary right, bearing date the 14th March, 1812.

Bates, in the bill filed by him, claims the land in virtue of a patent dated the 10th July, 1812, founded upon a county court certificate in the words following, to wit :—

*“Madison County Sct. May Term, 1803.*

On the motion of Richard Smith, satisfactory proof was made to this court, that the said Richard is entitled to four hundred acres of land lying on Collins' Fork of Goose Creek, by virtue of his having improved the same agreeably to an act of assembly for settling an improving the vacant lands of this commonwealth, and located as follows, to wit. Beginning ten poles above a sycamore tree, corner to Governor Garrard's survey of 500 acres, and running up the Creek with the general course thereof for quantity so as to include the Creek in or near the centre of the survey; and it is ordered that a certificate issue accordingly.”

Bates, Garrard &c. in the bill filed by them, claim the land in virtue of a patent to them dated the 7th

January, 1823, founded on a certificate granted by the county court in the following words, to wit :

*"Madison County Sct. July Court, 1803.*

On motion of Samuel Smith, satisfactory proof was made to the court, that the said Samuel is entitled to 1500 acres of land, lying and being in the county aforesaid, on the head waters of Goose Creek, a branch of Kentucky river, including his improvement, and also Salt Lick, by virtue of his having improved the same agreeably to an act of the general assembly for settling and improving the vacant lands of this commonwealth, and located as follows, to wit: Beginning 100 poles east of the upper end of his improvement, thence north 800 poles, thence west 300 poles, thence south, thence to the beginning for quantity."

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and  
H.&J. WHITE  
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RARD & Co.

The party, complainant, in each bill relied on the equity derived from the certificates aforesaid, and insisted that it should prevail against the elder legal title of the appellants.

The circuit court gave a decree, in each case, in favor of the complainant.

From the testimony in the cause, there can be no doubt of the notoriety of Goose Creek, Collins' Fork of Goose Creek, the sycamore corner to Garrard's 500 acres survey, and the settlements of Richard and Samuel Smith at the dates of their respective certificates. The position of these objects being known, there could be no difficulty in surveying the certificates according to their calls, and there is no doubt that surveys thus made would include, in that upon Samuel Smith's certificate, all the triangle in contest, and in that upon Richard Smith's certificates all of it except a very narrow slip. Unless, therefore, some one or more of the objections, taken by the appellants to the validity of the equity founded on said certificates, should prevail, the decree must be affirmed. We shall proceed to notice these objections.

It is contended, that both of the certificates are void, because the settlements of Richard and Samuel Smith, in virtue of which the certificates were



**J. & H. WHITE** granted, were not on vacant land. And it is also  
**vs.** contended, that the whole of the land, in contest, is  
**BATES,** covered by a patent to Reynolds dated in 1786.  
**and** Wherefore, it is insisted by the appellants, that no  
**J. & H. WHITE** decree can be rendered against them. It appears  
**vs.** that the settlements and improvements made by the  
**BATES, GAR-** Smiths are situated upon a tract of 500 acres, grant-  
**RARD CO.** ed to J. Pogue in 1799. The position of Reynold's  
 claim is not identified by the proof. We cannot de-  
 cide that it covers the land in controversy. The  
 investigation must, therefore, be confined to the ef-  
 fect which Pogue's claim has upon the certificate.  
 Pogue's claim does not cover the triangle now in  
 dispute, but if the consequence of its covering the  
 settlements be, that the certificates are void, the  
 equity deducible from them fails, and the appellees  
 have no right to recover.

We are of opinion that the certificates are not  
 void, although the settlements, in virtue of which  
 they were granted, are included within the bounds  
 of Pogue's patent. The first act passed by Kentucky  
 providing for the appropriation of her vacant lands,  
 was approved in December, 1795. On the 1st of  
 March, 1797, the legislature made provision for  
 those who had settled on military claims, by mis-  
 take, by permitting them to remove, settle on and  
 appropriate other lands which were vacant. I  
 Littell's Laws, 686. Similar provisions were made  
 in 1798, 1799 and 1800. See II Littell's Laws,  
 95, 273 and 381. In 1801, the law allowing set-  
 tlers who, through mistake, had settled appropri-  
 ated lands, to remove their certificates, was made  
 perpetual. See II Litt. Laws, 455. The act of  
 1801 adopts the second section of the act of 1800,  
 which provides for the removal of the whole or any  
 part of the certificate. The act of 1799 shows that  
 it was the intention of the legislature to permit the  
 removal of the whole or any part of a certificate  
 granted for a settlement on a *military or other prior*  
 claim. The first act, allowing county courts to  
 grant certificates for settlement, was passed Decem-  
 ber 20th, 1800. See II Litt. Laws, 420. All these  
 acts are parts of the same system, to wit, to appro-  
 priate the vacant lands owned by the state and to

Though the  
 settlement, in  
 virtue of  
 which county  
 court granted  
 certificate, be  
 within appro-  
 priated land,  
 yet the certi-  
 ficate not  
 void; all the  
 land not em-  
 braced by the  
 certificate,  
 and unappropri-  
 ated by  
 prior claim,  
 may be held  
 under such  
 certificate.  
 See Acts of  
 1796: 97-8-9;  
 1800, 1801,  
 1804; II Litt.  
 Stat. 95, 273,  
 381, 420, 455;  
 III Litt. Stat.  
 196.

provide for the settlement of the country ; and, therefore, the act of 1801, although adopted in reference to certificates granted by commissioners, would likewise embrace certificates granted by the county courts. But by an act of December, 1804, county courts were authorized to permit the withdrawal of the whole or any part of any claim entered on any *military* or *appropriated* land, and the re-location thereof on any unappropriated land. III Litt. Laws, 196. These acts of assembly clearly shew, that instead of its being designed by the legislature to make a certificate void, because the settlement happened to be upon a military or other prior claim, it was intended to secure to the settler all the land which may be within the bounds of his original certificate, not taken by the prior claim, and to indemnify him for the portion lost, by permitting a re-location, *pro tanto*, elsewhere. So far, therefore, as the triangle in controversy is concerned, we perceive no objection to the decrees rendered, because the settlements were on Pogue's patent.

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As the proof does not identify Reynold's patent boundary, and satisfy us that his title embraces the triangle, there is no necessity for deciding whether the appellants would, or would not, be protected by Reynold's claim had they shewn it embraced the land in controversy. Hence we shall pay no further attention to this part of the argument of counsel.

The next position, assumed by the appellants, which we shall examine, is their reliance upon the statute of limitations of seven years. Both bills were filed on the 18th March, 1824. It seems from the proof, that the appellants had possession, by the settlement of a tenant upon Pogue's survey, which they claimed, within the bounds of their 100 acres seminary claim, and likewise within the bounds of the surveys made upon each certificate granted to the Smiths as far back as 1810. That the possession by the residence of the tenant was continued up to the time Hugh White moved on the land, and that his possession has been continued by actual residence on the land common to the survey of Pogue, the seminary survey, and the surveys on the certificates

**H. & J. WHITE** from the the time he settled thereon, in 1818, until  
 vs. after the institution of these suits. The dwelling  
**BATES,** houses occupied by White and his tenant are not si-  
 and tuated upon the triangle in dispute. But as far back  
**H. & J. WHITE** as 1814 or 1815, White extended his fences upon  
 vs. the triangle, and actually enclosed part thereof, con-  
**BATES, GAR-**necting the enclosure with that about the houses,  
**RARD & C.** except they be considered as separated by a line  
 passing between. Bates, by himself and tenants, has  
 been in the actual possession by residence on the  
 survey, made in Samuel Smith's certificate, since  
 1810. His and his tenant's residence was outside  
 the triangle in contest. Bates and Garrard, more  
 than seven years before the institution of the suits,  
 by agreement, surrendered the possession to the  
 Whites of all the land within Pogue's survey.—  
 These being the facts, the question is, whether they  
 constitute a bar in favor of the appellants.

Seven years  
 actual occu-  
 pancy of land  
 under title de-  
 ductible of ri-  
 cord, whether  
 by one or  
 more, provid-  
 ed they be  
 connected  
 with each  
 other, by title  
 or estate, as  
 vendor and  
 vendee, land-  
 lord and ten-  
 ant, ancestor  
 and heir, con-  
 stitutes a bar  
 in virtue of  
 the act of  
 1809 against  
 all adversary  
 claimants.

It is very clear, that H. White had not himself  
 been seven years actually settled on any part of his  
 seminary claim prior to the institution of the suits,  
 and unless he can obtain the benefit of the settlement  
 and residence of his tenant, and add that to his own,  
 he cannot make out the length of time required by  
 the statute. But if he can avail himself of the settle-  
 ment and residence of his tenant, and couple that  
 with his own, he may make out the bar provided  
 for by the statute ; and then, if he can shew that he  
 is protected to the limits of his seminary claim, it  
 will follow that no decree should have been render-  
 ed against him and his co-defendant.

The limitation of seven years, provided by the  
 statute of 1809, begins to run from the date of the  
 settlement, provided the settler is connected with such  
 a title as the law requires at that time; if he is not,  
 then it runs from the acquisition of the title. Here  
 the title of the appellants was acquired in 1812, sub-  
 sequent to the settlement made by the tenant, and  
 therefore the limitation began to run from 1812. If  
 White's tenant continued to reside on the land for  
 seven years after title was acquired, and then the  
 landlord came in immediately upon the removal of  
 the tenant, we see no reason why he should not be

permitted to avail himself of the protection which the statute would have afforded the tenant, had he continued his possession, in the same manner that a vendee is allowed the benefit of the previous settlement and possession of the vendor. The object of the statute was to secure the domicils of families, and the land connected therewith, and where sales were made, the possession of the vendor, by an express provision, inures to the benefit of the vendee. The design of the statute equally requires the protection of the landlord who comes in after the tenant's term may have expired, and, therefore, an interpretation of the statute according to its spirit requires that the settlement and possession of the tenant should inure to the benefit of the landlord, and be accounted his. So, also, the settlement of the father under title and a continued occupancy for one or more years, might be united with the continued settlement and occupancy of the heirs after the father's death for the purpose of making the bar complete, although it is a case not expressly provided for by the words of the statute. The actual occupancy of the land, by settlement of seven years, under a title deducible of record, constitutes the bar which the statute intended to provide, and whether there be one or more occupants during the seven years is immaterial, provided they are connected with the same title, and hold under one another in succession or for each other. The actual residence upon the land is the best notice to adverse claimants, that the possessors are holding and enjoying the property as their own, and if an adverse claimant lies by for seven years under such circumstances, it was the intention of the statute to protect the domicil thus settled, and to give peace to its inhabitants. We have found nothing in the numerous decisions growing out of the act of 1809, which conflicts with the foregoing views. The case of *Skyle's Heirs vs. King's Heirs*, 11 Marshall, 385, would seem to justify the idea that seven years possession, without a settlement and residence on the land, would be sufficient. Subsequent cases, however, shew that an actual settlement and residence are required. See 111 Marsh. 133; 1 Litt. Rep. 172;

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H. & J. WHITE II Litt. Rep. 160; III Litt. 444; III Monroe, 164;  
 vs. V Monroe, 214. In the case in fifth Monroe, the  
 BATES, and court say, "a defendant to avail himself of the act of  
 H. & J. WHITE 1809 must shew a connected title in law or equity  
 vs. with an adverse interfering claim more than seven  
 BATES, GAR- years before suit brought, coupled with actual oc-  
 RARD & C. cupancy." It may be inferred from this language,  
 ----- that the "*actual occupancy*" required is not necessarily that of the defendant, but may be that of another with whom the defendant is connected by the relation of vendor and vendee or landlord and tenant.

The foregoing considerations have brought us to the conclusion that the appellants have shewn such a settlement and continued possession for seven years as will protect them, provided the benefits resulting from the settlement can be lawfully extended so as to include the triangle now in contest.

It is contended, however, that upon no principle can the benefit of the settlement be so extended, because the houses in which the settlers actually lived are not situated upon the said triangle. The case of Anderson vs. Turner, III Marshall, 134, is cited in support of the argument. We concede, according to the authority of that case, the settlement must be made "upon the land to which the claim is asserted" before the statute can furnish a bar. The enquiry, therefore, in this case is, whether the settlement has not been so made, within the meaning of the statute. The claim set up in the case of Bates, is Richard Smith's certificate, and the survey made thereon. The claim set up in the bill of Bates, Garrard & C. is Samuel Smith's certificate and the survey made thereon. The prayer of each bill is, that the defendants be compelled to relinquish to the extent of the interference. Now the settlement is within the bounds of both surveys made on the certificates granted to the Smiths within Pogue's patent and within the seminary claim granted to the Whites, although not upon the triangle down to which the controversy is narrowed. We say the controversy is narrowed down to the triangle, because the appellees have, for reasons not necessary to be given, no shadow of equity to any land within Payne's patent. But does the circumstance of the appellees having

The settle-  
 ment must be  
 made upon  
 the land "to  
 which claim  
 is asserted,"  
 and continu-  
 ed under ad-  
 verse title de-  
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 cord for sev-  
 en years, be-  
 fore the stat-  
 ute of 1809  
 furnishes a  
 bar.

no right to recover the settlement, although included within the claim set up by them, restrict the protection which the statute of limitations affords, to the land around the settlement, and to which the appellees have no equity? We think it does not. Could the appellees, by relinquishing five or ten acres around the settlement, thereby get clear of the effects of the statute upon the balance of the land common to the conflicting claims? Certainly not; for if they could, the statute would, by such an artifice, be defeated of its object. As we understand the statute, if the defendant settles within the lap with the intention of possessing his entire tract, then the statute runs in his favor for all the land common to the two claims; and if his adversary does not institute his action within these seven years, he is barred for all the land common to the conflicting titles. The idea of relinquishing the acre on which the dwelling houses stand, and recovering the residue of the interference, is altogether repugnant to a rational interpretation of the statute. If, therefore, the possession of White, emanating from and connected with his settlement, extends to the limits of his seminary claim, the appellants are entitled to the protection afforded by the statute, unless its operation be avoided by some of the considerations hereafter to be noticed.

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The case of Cates vs. Loftus' heirs, IV Monroe, 442, is an authority sufficient to shew that the possession of White extends to the limits of his seminary claim. As the settlement was made within the interference, the protection afforded by the statute of 1809 must be co-extensive with the possession, and therefore includes the triangle. But it is insisted by way of obviating this conclusion, that Bates and Garrard, in 1815, relinquished to White their right and possession to the extent of the interference with Pogue's patent, and that in consequence of the agreement to that effect, Bates &c. should be regarded as remaining in possession of the triangle, because that is situated outside of Pogue's patent. Such a conclusion cannot be sustained, because it is in direct opposition to the fact that White, for more than seven years prior to the institution of

**H. & J. WHITE** the suit, extended his actual enclosure over upon the triangle, claiming the whole of it. This gave him possession to the limits of his seminary patent.

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It is also insisted, that the relinquishment of 1815 should have the effect of restricting the protection, afforded by the settlement, to the bounds of Pogue's patent. We cannot perceive any good reason for tolerating such an idea.

The statute of 1809 began to run in White's favor from the date of the patent founded on the seminary claim in 1812. The running of the statute extended to the whole land common to the conflicting claims. Now we know of no method to arrest the running of the statute after it commences, unless the title, by act of God, or operation of law, be cast upon some one laboring under the disabilities provided for in the statute; or unless there be some interruption of the continuity of the possession by settlement; or unless the possession be converted from its adverse character into that which is friendly. None of these things appear to have taken place. To give the relinquishment of 1815 an operation to that effect would be to introduce, an exception unknown to the statute, and would be an exercise of legislative power.

It is moreover contended, by the appellees, that the settlement of White, and the extension of the enclosure upon the triangle more than seven years before the institution of this suit, cannot protect the appellants under the operation of the act of 1809, because Bates was a settler, and residing upon a part of the land surveyed in virtue of Samuel Smith's certificate. The case of *Hunt & Co. vs. Wickliffe, II Peters, 212*, is cited, and the conclusion attempted to be drawn from the facts in this cause, and the decision of the supreme court is, that as Bates resided on the land surveyed under S. Smith's certificate, if that certificate be valid, his residence should be regarded as conferring upon him "constructive possession of all the land not occupied in fact by his adversary." The statute of 1809 had no application to the case of *Hunt & Co. vs. Wickliffe*, as the supreme court declares in the opinion given; and the facts of

that case, in relation to the possession, are materially variant from the facts in the present case. Both Wickliffe and Hunt had possession, within the lap or interference, by actual occupancy; thus circumstanced, the court decided that the party having the better right was in constructive possession of all the land not adversely occupied in fact. But in the present case, Bates' actual occupancy was not within the lap or interference. White's possession, therefore, must be regarded as entire, and covering the whole triangle, to the exclusion of Bates. The decision of the supreme court has no operation on the controversy, and it is unnecessary to say whether we do or do not approve its doctrine in making possession under an entry, which is valid, control and limit the possession under the elder grant.

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and  
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RAND & CO.  
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It results from the foregoing view of the controversy, that the appellants were protected by the statute of limitations, and that the court erred in decreeing against them in the suit instituted by Bates upon Richard Smith's certificate, the answer to the bill in this case having relied upon the limitation of seven years.

The decree in this case must, therefore, be reversed, with costs, and the cause remanded, with directions to dismiss the bill.

But in the case of Bates, Garrard &c. vs. The Whites, the defence growing out of the statute of limitations has not been relied on in the answer, and cannot, therefore, be noticed. Hence it becomes important to enquire more particularly into the objections, made by the appellants, to the equity asserted by the appellees under Samuel Smith's certificate.

The Doft must set up seven years law as limitation in bar of adversary claimant, or court will not extend the provision of act of 1809.

It is contended, that Samuel Smith's certificate for 1500 acres is void on its face, because the county court had no authority to grant it. We readily concede, that under the act of 1800, II Litt. Laws, 420, county courts had no authority to grant certificates for a larger quantity of acres than 400. If a certificate was granted under this act for a greater quantity than 400 acres, and based upon no other consideration than improving and occupying as the act requires, we should not hesitate to declare it void.



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**RARD & CO.**

The certificate in question must be sustained by the act of 1802 providing for disposing of salt licks and salt springs, III Litt. Laws, 49, if there be any law which can sustain it. The last sentence of the act of 1800 prohibited the location of any salt lick or spring, with 1000 acres of land around the same, including the lick or spring, in the centre of a square, to be bounded by lines running to the cardinal points. By the act of 1802, the legislature subjected salt licks or springs to appropriation. The act provides, "that if any settler has included in his settlement, made under any former law, a salt lick or spring, or may hereafter, by virtue of this act, include in his settlement any such lick or spring, such settler may obtain a title therefor upon paying into the treasury six shillings for every acre which he or she may think proper to survey around or adjacent to said lick or spring, which survey shall not include less than 1000 acres, if so much can be had vacant." By a *proviso*, nothing contained in the act is to effect the claim of any settler within the bounds of said 1000 acres where such settler shall pay one dollar per acre for all land claimed by him agreeable to the rules and regulations of this act, and "to obtain a title to the said salt spring or lick, and the said land around the same as aforesaid, the same proceedings shall be had and pursued as is directed by the act entitled "an act to amend the act for settling and improving the vacant lands of this commonwealth." The act referred to is an act passed in 1801, II Litt. Laws, 459, but when it is examined, it will be found, that it does not direct particularly the mode to be pursued in appropriating vacant lands. It only exempts settlers from burdens and difficulties which were imposed by the law of 1800, (which is the root from which all the authority of the county courts springs,) and lengthens the time to obtain warrants &c. As the act of 1802 clearly intended to subject salt licks and springs to appropriation, and in prescribing the mode by which it was to be accomplished, referred to the amendatory act of 1801, which contains no specific directions, we feel bound to take the act of 1800, modified by the act of 1801, as fur-

nishing the rules by which the appropriations were to be made, connecting therewith the provisions of the act of 1802. Viewing these different acts in connection, the following rules, it seems to us, should be observed in appropriating a salt lick or spring.

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1. The claimant must be a settler.
2. The claim must commence with the certificate to be granted by the county court.
3. The certificate must include the settlement and salt lick or spring, and contain a special location of the land intended to be appropriated
4. The location in its length should not exceed its breadth more than one third, unless interrupted by prior claims.
5. The face of the certificate should shew that the claimant intended to appropriate a salt lick or spring, where the quantity of acres granted exceeded 400.

The certificate of Samuel Smith shews, upon its face, that the design was to appropriate a salt lick, and an improvement made by him under the act for settling and improving vacant lands; and it contains, conceding the notoriety of the improvement, a very special location. But the location given exceeds its length in breadth more than one third, and is silent in regard to the necessity of assuming that shape in consequence of the position of prior claims. The certificate does not, in express terms, denominate Smith a *settler*. Is it void, because the length of the location is greater than the law allows, provided prior claims do not exist? or, rather, is it void, because the position of the prior claims are not described in the location, and because Smith's improvement is not denominated a *settlement*? We think it is not.

The rules given by the legislature were for the observance of the county courts, and should be respected by them in deciding and adjudicating upon the applications of persons for certificates. If the certificate be granted for such quantity of land as they had authority to grant, and the location be

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and **H. & J. WHITE** vs. **BATES, GAR-**  
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special, a valid equity passes to the grantee against all subsequent claimants from the commonwealth; and we are bound, in a controversy with such claimants, to take it for granted that the county court enquired into the existence of all the facts upon which the law authorized them to grant the certificate, and that the facts at the time authorized the quantity of the certificate as issued. If the county court, in its certificate, should say no more than barely to shew their authority for acting, and then should grant a certificate for a tract of land, by a special location, we think it would pass a valid equity to the grantee. We would not reinvestigate the facts for the purpose of determining that the county court erred, and thereby to sustain the claim of one originating subsequent to the certificate. We shall, therefore, take it, that the county court, in adjudicating upon the application of Samuel Smith for a certificate, investigated and decided that the position of other claims authorized the location as made, and that Smith, as a settler, had a right to appropriate his improvement and the salt lick. These views are fully sustained by the doctrines contained in the cases of Ward and Renton vs. Lee, I Bibb, 18; Speed vs. Severe &c. II Bibb, 134; McNitt vs. Logan, Litt. Sel Cases, 67; Loftus &c. vs. Mitchell, III Marshall, 598.

If we are correct in the position, that the facts existing justified the location as made, at least that they must be so regarded, as it relates to White, a subsequent claimant, and that the certificate of Samuel Smith gave him a valid equity, we cannot admit, as contended by the counsel for the appellants, that a relinquishment of a part or parts of the land embraced by the certificate, because it is covered by paramount claims, can vitiate the equity to the part not relinquished. We have already shewn, that a person settling by mistake on appropriated land, and obtaining a certificate including some land which was vacant, could not be prejudiced in his claim to the vacant land, by removing so much of his certificate as interfered with the paramount claim. In like manner, we cannot perceive how a surrender or relinquishment, which the law tolerates, of a part

which cannot be held owing to prior claims, shall subject the balance, not relinquished, to appropriation as vacant lands.

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The argument, that the claim, founded on Samuel Smith's certificate, is void for failing to obtain a warrant, cannot be sustained if we are correct in the position that the county court properly granted the certificate. The act of assembly passed in 1803, III Litt. Laws, 132. and the case of Loftus & Co. Sharp, III Marshall, 597, are complete answers to the argument.

We are of opinion, that the appellees have shewn a valid equity to the triangle under the certificate of Samuel Smith, and that the decree must be affirmed, unless the sale of the claim for the non-payment of the instalments, and its subsequent redemption, has vitiated it so that it cannot be asserted against the appellants.

It appears from the auditor's certificate, that the whole of Samuel Smith's claim was sold to the state in November, 1808. for the non-payment of the first instalment, and that 509 acres thereof were redeemed on the 11th of the same month, and that said 509 acres were sold to the state in November, 1816, for the non-payment of the fifth instalment, and redeemed and paid on in full on the 9th of December, 1822.

After the title of any individual was purchased by the state, at the register's office, for the non-payment of the instalments, it was certainly competent for the legislature to prescribe the terms upon which the Commonwealth would reinvest the owner with his title, by suffering him to redeem. It becomes necessary, therefore, to examine with accuracy the various laws prescribing the terms on which redemptions are allowed.

In 1806, the debt due the state for her vacant lands was divided into twelve instalments, the first to be paid on the 1st of December, 1807, and so on annually thereafter. In case the instalments were not paid as they became due, sales of the land were directed. If any tract did not bring the instalments and interest due, when offered for sale, it

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was to be stricken off to the state, and thereby became liable to the future disposition of the legislature. Lands so stricken off were redeemable, however, at any time within two years. If not redeemed within that time the right of the owner became extinct, and the title vested in the Commonwealth absolutely. III Litt. Laws, 386. The provisions of this act were not permitted to go into operation from year to year according to the intention of its framers. Various acts were passed granting indulgence to settlers and exempting their lands from sale to individuals, upon their filing certificates of actual settlement, and postponing the sales which would have taken place at an earlier period under the act of 1806. We deem it unnecessary to notice any of these acts but that approved on the 11th Jan. 1816, the provisions of which were annually revived and applied to the succeeding year until some time after the redemption took place, which is now the subject of investigation. The seventh section gave twelve months from the passage of the act to any person whose land had been stricken off to the state for the first, second, third and fourth instalments, to redeem. The tenth section provides, "that no person or persons, other than actual settlers, shall be authorized to redeem lands which have been forfeited to the Commonwealth for failing to redeem the same within the time allowed by law, so as to give him, her or them any right, title or claim to the same, where it shall interfere or conflict with the survey of any person actually settled thereon, or with an entry or survey made by virtue of a seminary warrant, and should a grant issue, it shall be void, so far as it does so interfere." All lands which have been stricken off to the state, and have not been redeemed within the time allowed for that purpose, fall within the denomination of land "forfeited to the Commonwealth for failing to redeem the same within the time allowed by law." The sale for the fifth instalment took place in November, 1816, when the certificate of Samuel Smith was sold or stricken off to the state for the non-payment of that instalment. Applying the provisions of the act of 1816 to the year 1817, the owner of Smith's

certificate had a right to redeem it from the effects of having it stricken off to the state for the fifth instalment at any time within twelve months from and after the 11th of January, 1817; but as it was not redeemed within that time, his right of redemption was forfeited, and, consequently, it might be said, without great inaccuracy of language, that the land itself was forfeited for failing to redeem within the time allowed by law. Subsequent acts continued to confer the right of redeeming notwithstanding such forfeiture, but the right was limited, by the continued operation of the 10th section of the act of 1816, to actual settlers, when the claims redeemed interfered with an entry or survey made by virtue of a seminary warrant, or with the survey of any person actually settled thereon. If, then, the appellees were actual settlers, within the meaning of the said 10th section, they were authorized to redeem Samuel Smith's certificate from the effects of the forfeiture, and the claim thus redeemed would, in their hands, possess all its original validity; but if they were not actual settlers, then the redemption was illegal, and their claim is void so far as it interferes with the seminary claim of the Whites.

The object of the legislature in making redeemed claims void so far as they interfered with an actual settler or a seminary claim, was to give peace and quiet to settlers and to avoid litigation; but in favor of an actual settler, forfeited claims were permitted to be redeemed, and the person owning them, notwithstanding the redemption, reinvested with all the original equity pertaining to the claim; because between settlers there could be no preference except that which might grow out of the best original title to the land. John Bates, one of the appellees, was actually settled within the bounds of the survey made upon the certificate of Samuel Smith, at the time of its redemption in 1822. He consequently was placed in the condition which authorized him to redeem under the provisions of the 10th section of the act of 1816, so that when the redemption was effected, he could assert the claim founded on Smith's certificate, with as much success as if it had never been stricken off to the state. The fact that

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**&c.**

Garrard &c. had a joint interest with Bates in the 509 acres, and were not actually settled upon the land, cannot operate so as to prevent Bates, the settler, from redeeming the whole claim. It might be contended that as Bates owned a third only, and he alone was actually settled upon the land, that the right of redemption, under the said tenth section of the act of 1816, extended to his third part only. It seems to us that such a construction ought not to prevail, because Bates' interest, being joint, extended to the whole tract. He was seized *per my et per tout*, in legal parlance. His interest and possession extending to the entire tract, his right to redeem must be regarded as co-extensive with his interest and possession, unless the legislature had thought proper to restrict it in express terms.

We have, therefore, reached the conclusion that the claim founded on Samuel Smith's certificate was rightfully redeemed, and that the decree in favor of Bates, Garrard &c. must be affirmed, with costs.

*Hardin and Brown, for the Whites; Turner, Crittenden, and Owsley, for Bates and al.*

### **Sterritt vs. Lockhart &c.**

Case 166.

Error to the Simpson Circuit.

*Re-hearing.*

- October 27, Chief Justice ROBERTSON delivered the Opinion of the Court, Judge Underwood did not sit.

As the only two members of the court, who can adjudicate in this case, do not concur in opinion, (one being for a reversal and the other for an affirmance of the judgment below,) and as the legal effect of granting a re-hearing was a revocation of the former opinion (see *Lipscomb vs. Grubs*, III Bibb, 392,) therefore the necessary consequence must be, that the former opinion cannot be the judgment of this court, but remains revoked, and the judgment of the circuit court stands affirmed, in consequence of the equal division of this court.

*Crittenden and Morehead, for plaintiffs; Brown, for defendants.*

**Hickman and Pearson vs. McCurdy.** CHANCERY.

Error to the Franklin Circuit; Todd, Judge.

Case 164.

*Parol testimony. Record, effect of. Jurisdiction of  
chancellor. Co-sureties. Liability. Contribution.*

Judge UNDERWOOD delivered the opinion of the Court.

October 17.

Chief Justice Robertson did not sit.

ON the 31st of October, 1824, McCurdy and others conveyed to J. Harvie, for the use of the President, Directors and Company of the Bank of Kentucky, a house and lot in Frankfort.

The consideration expressed upon the face of the deed is \$4,248. McCurdy mortgaged the same property in 1819, to Hickman and others, to indemnify them against loss in consequence of their being sureties for him. One of the debts mentioned in the mortgage was due to the Bank of Kentucky, and for this debt, amounting to \$1,700, Hickman was one of the sureties. All the mortgagees united in the execution of the deed to Harvie. McCurdy, Hickman, and Taylor were jointly bound, as sureties for Pearson, to the Bank of Kentucky for the payment of \$2,780. The Directors of the Bank accepted the deed for the house and lot as a full discharge of the balance of the debt due by McCurdy, and in satisfaction of \$2,254 92 of Pearson's debt. The property was not worth \$4,248. According to the evidence, about half that sum would have been a fair cash price for it, at the time the Bank received it.

In 1827, McCurdy filed his bill, alleging that Pearson was insolvent, that Taylor had paid him a third, and that Hickman had failed to pay the third of the amount settled with the Bank for Pearson. Wherefore, he asked a decree against Hickman for his third, and for general relief. By an amendment to the bill, Pearson was made a party. But no decree was asked against him in express terms.

The circuit court decreed that Hickman and Pearson should each pay McCurdy \$1,061, and that Hickman should pay the costs of suit. To reverse these decrees, this writ of error is prosecuted.



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Hickman relies on a judgment rendered in a suit at law, as a bar to any decree against him in this suit. The validity of this defence is the first question.

It appears that McCurdy sued Hickman, in assumpsit, with a view to recover the proportion of the Pearson debt, for which he was liable. The declaration contains a single count, in which the drawing of the note by Pearson, payable to Hickman, Taylor, and McCurdy jointly, their endorsement of it to Hunter, its discount by the Bank of Kentucky, its non-payment at maturity, the recovery of judgment thereon, by the Bank, against drawer and endorsers, and the payment of the judgment by McCurdy in *property of the value \$4000*, are all distinctly and at large averred. Pearson's insolvency is likewise averred. Upon the facts thus stated, the declaration, as a deduction of law, alleges the assumpsit, on the part of Hickman, to be a "promise to pay \$2,000, being the amount of his proportion of the value of the property aforesaid, by which the judgment aforesaid was satisfied." The breach is then assigned in the non-payment of the money. Hickman demurred to the declaration, and the court thereupon gave judgment in bar of the action. It is the judgment thus rendered, which Hickman has pleaded in bar of the relief sought by the present suit. Several depositions have been taken, proving that the reason given by the court for deciding in Hickman's favor, upon the demurrer, was that McCurdy had remedy exclusively in chancery. Exceptions were filed to the reading of these depositions for want of notice, and because they were taken in term time.

Parol testimony not admissible to explain a record, or to show upon what grounds judge decided. — the record itself showing the

Without enquiring into the propriety of the exceptions, we are of opinion that the depositions should have been rejected. The effect and operation of a record cannot be controlled by proving that the reasons of the judge for entering the judgment were erroneous. Where the form of the count is general, as the common counts in assumpsit, testimony may be introduced, to show what matters were embraced by the trial, and what were excluded.

ed, and thus application of the judgment rendered is made to operate as a bar to future litigation arising upon the matters settled. But where a record, upon its face, as here, shows what matters were put in issue, the judgment of the court cannot be controlled by proving that the judge gave erroneous reasons, and was influenced by them in deciding the cause. If such a doctrine were established, it would go a great length in destroying the verity and efficacy of records. It matters not whether the reasons of the judge be right or wrong, so far as the efficacy of the judgment rendered is concerned. If the judgment be correct, the erroneous reasons on which it was based will not vitiate it. If the judgment be wrong, the constitution and laws have provided this tribunal to reverse it. The creation of this court by the constitution, and the regulation of appeals and writs of error by law, proceed upon the ground that the judgments of inferior tribunals, however erroneous, must stand and be enforced until regularly reversed. If the errors be apparent on the face of the record, unless it be of such a character as to render the proceeding void, it does not vitiate the judgment, much less can it be destroyed by proving how badly the judge reasoned.

Under the opinion of a majority of the members of this court in the case of *Hunt vs. Terrell's heirs*, not yet reported, the judgment upon the demurrer must bar this suit, if the declaration be good. The case of *Ford's executors vs. Wilson's administrators*, 11 Bibb, 538, cited in argument, is not decisive of the question under consideration. There the court refused to permit the defendant to make any defence at law, entertaining the opinion that the matters of defence contained in the pleas were only cognisable in chancery. But here a full trial at law was had upon the matter contained in the declaration. If the pleas offered by Wilson's administrators had been filed instead of being rejected, and the court had given judgment upon demurrer against the pleas, the cases would then have been analogous. If the pleas had been filed and the matters set forth in them had been sufficient to bar the action, and the pleas had been adjudged bad upon demurrer, we apprehend

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questions to be adjudicated. On common counts, trial of perjury testimony may be used to show the extent of the inquiry before the jury.

Judgment at law a bar to re-investigation of same matter in chancery, unless defective proceedings.

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Surety pays  
debt of prin-  
cipal in pr-  
perty. The  
law does not  
imply an as-  
sumpsit on  
part of prin-  
cipal that he  
will pay re-  
curety the va-  
lue of the  
property; the  
extent of li-  
bility cannot  
exceed the  
amount of the  
debt.

hend that a resort to the chancellor could not be justified, because the judge *thought* the matters contained in the pleas exhibited a defence exclusively cognizable in a court of equity.

The merit of Hickman's defence, so far as it depends upon the judgment in the action at law, turns upon the sufficiency of McCurdy's declaration. We think it is fatally defective, and that the demurrer was properly sustained. The law raises no such assumpsit as that set forth. If the value of the property paid in discharge of Pearson's debt, exceed the amount of the debt, then it would follow that the surety making payment in property, would have a right to recover of his co-sureties or of Pearson, a greater sum than that which he owed, provided the assumpsit raised by law be to pay the value of the property, instead of the amount of the debt. The extent of liability cannot exceed the amount of the debt. Upon no pretext can it be said that a surety has paid for his principal and co-sureties more than was owing by them. The law cannot estimate the sacrifice, the trouble and expense which he incurs in raising the money with which to pay the debt. If property is sold under execution at half or a fourth of its value, the surety can only ask indemnity for the price or money brought by the sale. So likewise if he voluntarily pay double the debt in property, when fairly valued, his recourse must be limited to the amount of the debt. He cannot be regarded as expending more than that for his principal and co-sureties, because they did not owe more. The declaration in the suit at law avers the property paid to be of greater value than the amount of the debt for which McCurdy was bound as surety, and the attempt is to recover from Hickman, the co-surety, his portion of the value of the property. Thus the declaration attempts to impose a responsibility beyond the measure which the law allows. Consequently no such assumpsit arose upon the facts averred as that set forth, and hence the judgment on the demurrer was correct. The declaration being defective according to the case of *Kendal vs. Talbot &c.* 1 Marsh. 322, the judgment upon the demurrer constitutes no bar to another action for the same cause.

There can be no doubt as to the jurisdiction of the chancellor in affording McCurdy appropriate relief. Indeed, the liability of co-sureties for contribution, originally grew out of a rule of equity which at length ripened into a principle of law, so that at this day courts of law and chancery entertain concurrent jurisdiction in giving remedy to the surety, paying the debt. See *I Maddox*, 233. and *Lansdales administrators &c. vs. Cox*, VII *Monroe*, 403.

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Liability of co-sureties for contribution originated in equity; jurisdiction of court of law and of equity concurrent.

The next question for adjudication relates to the amount which McCurdy has a right to recover. And here it may be asked, whether his recourse against Pearson, the principal, is to be regulated by the same rules which must govern as between co-sureties. According to the civil law a surety, at the time he paid the debt, had a right to stipulate with the creditor for a cession of his actions, and in that case the surety was subrogated to all the rights and actions of the creditor, and might prosecute them against the debtor with the same effect that the creditor could have done. This rule would allow the surety to recover of the principal debtor the full amount of the debt without regard to the sum which the surety may have paid in discharge of it. Where the surety neglected to acquire this subrogation, he was still allowed to prosecute an action in his own right against the principal debtor, in order to be reimbursed what he had paid. This doctrine may be found in Pothier on obligations, chap. 6, section 7, article 1. Wherever the surety stipulates with the creditor for all his rights against the principal debtor, we see no reason why he should not be fully substituted in the place of the creditor so as to recover the whole amount without regard to what the surety pays. The principal debtor cannot object that he is charged with the whole amount of his obligation, because he has received value to that extent, and it cannot matter whether he pays it to the creditor or to the surety, to whom the creditor may have transferred it by express stipulation. But where the creditor receives from the surety less than the full amount of the debt in discharge of the whole, and makes no contract to put the surety in his place, then all that the surety can ask, is an indemnity for

When surety stipulates with the creditor for all his rights as the principal, he can recover the whole amount due by principal without reference to what he pays. If no such stipulation, he can recover no more than a reimbursement.

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what he pays; for in this case the creditor may have been induced to abate in his demand through favor to the principal debtor. In this record there is no evidence that McCurdy stipulated with the bank that he should stand in their place in respect to the collection of the whole debt from Pearson. The testimony rather proves that no contract on that subject was entered into. We are, therefore, of opinion that McCurdy cannot lay a foundation on which to recover against Pearson beyond what he has paid, or in other words, an indemnity for his loss.

Rule between co-securities must be equality in bearing the burden resulting from the insolvency of principal.

The rule as between co-sureties must, under all circumstances, be that of equality in bearing the burden cast on any one of them by the insolvency of their principal. Sureties cannot be required to pay the whole debt to that one who discharges the whole by the payment of a less sum, under the idea of substitution, because if there be three sureties, A, B, and C, and A pays the creditor with half, if he recovers the whole of B, he has the right to the substitution and can then go back on A for his full proportion, and thus it amounts at last to a division of the loss among them. As, then, McCurdy made no contract with the bank whereby he became entitled to the rights of the bank, in enforcing the payment of the whole debt from Pearson, his right to recover from Hickman and Pearson stands upon the same foundation.

We deem it unnecessary now to decide whether our statute giving a remedy, by motion, in favor of the surety discharging the debt, changes the measure of responsibility and the amount which may be recovered from the principal debtor and his co-sureties. Be that as it may, McCurdy has not pursued his statutory remedy. He has applied to the chancellor and must be redressed according to the principles by which the chancellor's conscience is and ought to be governed.

If surety pay debt of principal, in money, he is entitled to sum

According to the view already taken, McCurdy has a right to claim an indemnity for his loss and no more. The question is, how much has he lost? His counsel contend that he sold his property to the

bank at a fixed price, and that Hickman and Pearson have no right to go into the inquiry whether the price allowed was more or less than the value of the property. If the price allowed be regarded as so much money paid to McCurdy, and then returned by him to the bank in discharge of his own and Pearson's debt, we should be compelled to say that his loss was equal to \$2,254 92, with interest thereon from the date of the cashier's receipt. If instead of selling the property to the bank, McCurdy had sold it to an individual for \$4,248 in money, and he had paid it over in discharge of his own and Pearson's debts, there could have been no doubt of Pearson's liability to him for the whole \$2,254 92 with interest, and of Hickman's liability for a full share of it, to-wit, a third. But we conceive, there is a material difference between the actual conversion of a house and lot by sale into money, with which debts are paid, and the conveyance of the house and lot directly to the obligee or to another for him in discharge of debts. Where the money is actually received and paid out, the familiar doctrine of money expended for the use of another, applies in subsequent controversies between surety and principal or between co-sureties. But property may be, and often is conveyed in discharge of a debt, because the creditor can get nothing else, and therefore accepts what is offered. Creditors often consider the debts due them as worth only half or a fourth of their nominal amount. In settling and compromising such debts, it makes no difference, whether the debt be rated at its nominal amount, and the price of the property accepted in payment be doubled or quadrupled, or whether the debt and property both be reduced to their true value or fair market price. It is clear from the proof, that McCurdy's property conveyed to Harvie for the use of the bank, was worth not much more than half what the bank allowed. It is equally clear, that it was owing to the doubtful and laboring circumstances of the debtors, that the property was received in discharge of debts at the price of \$4,248. A sale of property for money at its fair value, did not enter into the contemplation of the parties. When the bank allowed

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paid and interest, if in property, he is only entitled to value of property and interest. The same criterion, as to recovery from co-security.

**HICKMAN &c** \$4,248 in doubtful debts for the property, the arrangement did not make the property of that value  
**vs.** in money. McCurdy's loss did not exceed the money value or fair cash price of his property, and to  
**McCURDY.** that must his recovery be restricted.

**Acknowledgment of consideration in deed no estoppel. True consideration may be proved by parol.** Hickman is a party to the deed which conveys the property to Harvie for the use of the bank, and that deed states that the conveyance was made "in consideration of the sum of \$4,248 in hand paid, &c." The deed concludes with a warranty of title by McCurdy alone. If it can be viewed in the light of an estoppel upon Hickman, because he as a party to the deed has acknowledged the payment of \$4,248 for the property, he cannot now be permitted to question that it was worth that sum; for if that amount in money was actually paid as the acknowledgment purports, Hickman should account for his portion of the money applied to Pearson's debt. It was decided in the case of Gilly vs. Grubbs, 1 J. J. Marshall, 389, that the acknowledgment in the deed of the payment of the consideration, was only *prima facie* evidence of payment, and that it might be contradicted by parol testimony. We are satisfied with the doctrine of that case, and it results that Hickman is not estopped to prove that \$4,248 were not actually paid. This he has done, by showing that the bank paid doubtful debts instead of money. The amount of McCurdy's loss must, therefore, be ascertained by proof of the fair money value of the property, and not by what it was rated at in the compromise.

**Remote responsibility upon warranty does not affect the contribution of co-securities. That is regulated by actual loss.** It was contended in argument, that McCurdy's responsibility on the warranty contained in his deed, should induce us to regard the value of the property as properly fixed at \$4,248, because in the event of its loss by a paramount claim, he would be compelled, upon the warranty, to answer for that sum. Were it certain that McCurdy would be compelled to pay that amount upon the warranty, we should hold Hickman and Pearson responsible for it. In such an event McCurdy's loss would equal that sum, and under the principles laid down, his recovery should be measured by it. But there is no intimation in the record, that the title to the property is in

danger. If it be safe, McCurdy's responsibility on the warranty is nothing. If it be unsafe, it was his duty to show it, and the grounds upon which he required an indemnity on that account. In the absence of allegation or intimation to the contrary, we must presume the title indisputable.

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Another question yet remains. What portion of the value of the house and lot shall Hickman and Pearson pay? Does equity require that the amount of McCurdy's own debt (so to speak) shall be deducted from the value, to be ascertained as required by this opinion, and then, that Hickman and Pearson each be decreed to pay one third of the balance, or shall the value of the house and lot, to be ascertained as herein directed, be apportioned between McCurdy's own debt and Pearson's debt, according to their amounts, and Hickman and Pearson each be required to pay one third of that portion applied towards the extinguishment of Pearson's debt? We think that the value of the house and lot should be apportioned between the two debts according to their amounts, and that Hickman and Pearson should each pay one third of the portion applied to the extinguishment of Pearson's debt. In legal estimation, McCurdy was equally bound to pay both debts. His property was received in payment of both, but it passed at a higher price than its true value. In the arrangement made, the property paid the balance of McCurdy's debt and \$2,254 92 on Pearson's debt. Therefore, as the aggregate of the balance of McCurdy's debt and the said \$2,254 92 is, to the true value of the house and lot at the time the payment was made, so will be the said \$2,254 92 to the portion of the value applied to the extinguishment of Pearson's debt. This rule will work the case, and show what portion of the value of McCurdy's property has been applied to the payment of the debt for which he and Hickman were bound in conjunction with Taylor, as sureties. One third of this portion, with interest from the time it was paid up to the date of the decree, is the measure of Hickman's liability. It was erroneous to charge Hickman with the costs expended in suing Pearson.

To ascertain the liability of co-security, the value of property paid should be apportioned among the debts paid according to their several amounts.



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We have thought it best, to save trouble upon the return of the cause, to fix the value of the house and lot. Under all the circumstances, we are disposed to allow as high a price as the evidence will warrant. Harvie says, in the consultations had on the subject, the opinion prevailed that the property was worth \$3000; Brown says the bank held the property at \$2500, and he thinks it was sold too low to Page at \$2000; the other evidence fixes on \$2000 as a fair price, and one witness brings it down to \$1400 or \$1500. We shall take \$2250 as the true value, being a medium between the highest and lowest value spoken of, and the circuit court in entering their decree must take that as the true value.

The decree of the circuit court is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

*Monroe and Brown, for plaintiffs; Crittenden and Morehead, for defendant.*

*Counsel for plaintiffs in error, filed the following petition for a re-hearing, which was overruled.*

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 re-hearing.

THE counsel for the plaintiffs in error, move for a re-hearing of this cause, on the question of the measure of the liability of Pearson, the principal and of Hickman, one of the sureties, to McCurdy, the co-surety, who compounded with the creditor, and thus satisfied the debt.

The opinion delivered by the court, on this point, would establish principles of extensive operation, and introduce into our code, new rules, without the sanction of a single book of authority; and which, the counsel verily believes, are contrary to the sense of society, and the consequent practice in the country.

*Portier*, the only book cited by the court, is an elementary treatise on the *Roman law*, as it prevailed in *France*, the author did not know the laws of *England* nor *Kentucky*, nor profess to treat of our system. And therefore, his book is of no authority to prove the laws of this land. But an examination of the *civil law* of obligations, will show that the doctrines cited by the court from that author, are whol-

ly inapplicable to the obligations and liabilities of sureties to their principal, and each other, under our code of law; and that the introduction of the civil law rules laid in the opinion, would effectually mar the security of our system.

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According to the civil law, the obligations of the principal and surety, are not *joint* but several only, as we would term it; and moreover, that of the principal debtor is regarded as the *principal*, in the language of the school men, and that of the surety an *accessory* obligation; and the surety cannot be subjected to the payment of the money until the principal has been, in our language, prosecuted to insolvency. It results from the character of the obligations of the parties, that the surety, under the civil law, not jointly bound with his principal, may just as well purchase up the obligation of his principal, as any stranger to the matter, and proceed against him, with all the rights, and by all the means, the original creditor might. And in consequence of the ultimate liability of the sureties, in case of the insolvency of the principal, the law gives him rights a stranger has not; he may pay the money to the creditor, who might not be willing to sell and assign his debt, and thereupon demand an *accession* of his action, and thus obtain the subrogation to all the rights and actions of the original creditor.

But the nature of our *joint* obligations of the principal and surety, to the creditor, makes the operation of accession, and subrogation, *legally impossible*. When one of a plurality of joint obligors, pays the debt, the debt is *extinguished* and the obligation *gone* forever; and there can be no accession to that which is extinguished and has ceased to exist. A joint obligation is "an unit," and consequently cannot exist as to one obligor, and remain in force as to the others. A release or extinguishment by any other means, or even a suspension of the obligatory force of an obligation, for a day, as to one of the parties, nullifies the whole obligation as to all the obligors forever. These are first principles of the common law of obligations, and no authority is necessary to prove them. They necessarily result from the nature of

HICKMAN & the subject, and are proved, if proof were necessary,  
 v. by the most certain logical deductions.  
 McCurdy.

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 re-hearing. But see here, in one case, the obligation of Pearson and his sureties, were all made joint, by the law authorizing the recovery of *one* judgment, on the negotiable note, against all the parties, and the actual recovery of the judgment, which extinguished the obligations on the note; and the obligations of the sureties were originally, joint and joint only, and moreover the one judgment was against all, the principal and all the sureties.

We would, therefore contend, that it was always impossible for McCurdy to have purchased the debt on Hickman, or to have stipulated for an accession of the rights of the creditor, or to have obtained a subrogation by any means whatever, without doing violence to all the principles of the common law; and as to Pearson, the operation could not have been effected after the judgment which merged the obligations of all the defendants recovered against, and made their liability joint and joint only.

The counsel are aware, that the court have determined that, the case made out did not come within the principles above combatted; but the court has laid down the doctrine in such terms, that it could actually be regarded as a rule in subsequent cases; and the counsel would say, with the Barrons of England, "in nothing let the law of *Kentucky* be altered by the civilians;" and the court seem to have been conducted to the ground, on which the case is decided, by the civil law doctrine.

The ground of the opinion will be now discussed. McCurdy *compounded* the debt of Pearson for which he was bound as surety, and this debt *only*. He did not compound his own debt. His own debt *was not a doubtful* debt. It was not so considered by the parties, nor have this court so viewed it; it, McCurdy's own debt, was *secured* by a valid mortgage on a house and lot, of greater value, as the creditors considered it, and as the court valued it on the testimony, than the amount of his debt. We contend that it is unjust, that we should be charged, upon the same principles as if McCurdy had, in fact, com-

pounded *both* the demands, as has been done in the opinion delivered. This, it is respectfully suggested, is the error of the opinion. It fully appears in the case, that the house and lot was the only fund out of which the creditors expected payment from any of the parties; and had not this property been already pledged for the payment of McCurdy's own debt, we would not have thought of denying his right to employ it in compounding both debts. But the property was already appropriated to his own debt, beyond his power of extricating it, and thus his debt was actually secured, and was a good debt, not a bad nor a doubtful debt.

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The appropriation of the property to pay a good debt, for which it was already pledged, to the amount of that debt, and *then*, with the overplus, to compound a desperate debt, certainly ought not to be construed into a compounding of both debts. This being, in *fact*, the transaction, the form given to it cannot be material. This principle the court have, in substance, recognised in the opinion.

The doctrine here contended for may be illustrated by examples. Suppose McCurdy's own debt to the Bank had been secured by the additional obligation of undoubtedly solvent endorsers, or by a pledge of the stock of the Bank, by a third person, to any amount, and the Bank, merely to save the delay of an action, and the extraordinary expenses of the suit, had agreed to receive for the amount of his debt, and for that very doubtful debt for which he was bound with Hickman and others as surety for Pearson, the twenty two hundred and fifty dollars in money, could it be said that *both* debts were compounded, and that McCurdy would be entitled to recover on that principle according to the rule laid down by the court?

Or suppose McCurdy had walked into the Bank and presented the cashier with \$2,250 of notes on the institution itself, payable to his own order, and had assigned them to the cashier, in trust, to pay his own debt; that it afterwards appearing to the Bank that this was all the whole of the parties bound for both of the debts were worth, they had agreed,

**HICKMAN & C.** in order to save the expense of a suit and to close  
 vs. the matters, to receive that money in payment of  
**McCURDY.** all, and had done so—would Pearson, the principal,  
 Petition for a or the sureties, be liable for more than what the  
 re-hearing. money paid exceeded McCurdy's own debt?

McCurdy is exactly in the same ground where he was when he had conveyed the house and lot to the Bank, by his new deed, in extinguishment of both debts, except that he holds Hickman's bond for the balance of the price of the house. Now, how will this matter be settled? I would say Hickman ought to have a discount, out of his bond, for McCurdy's one third of the amount of the bond, because the bond is for exactly the sum Hickman paid for Pearson's debt. But if I could contend for Hickman, as McCurdy now does for himself, that the \$2,250 was advanced by him to the Bank for both debts, at the same discount, then I might insist that he had paid about fifty per cent. on the surety debt, and purchased the mortgage debt at the same discount. And would this be right? Certainly it would be, if the rule laid down by the court be correct. But McCurdy would answer, that Hickman had paid only the difference between McCurdy's own debt and the \$2,250 for the Pearson debt, as Hickman now contends; and Hickman could not deny that such was the fact. He was sure of recovering the amount of McCurdy's debt when he made the purchase, because the house was bound.

And how can McCurdy now, in the present case, deny that he did first pay his own debt with the house and lot, which its whole weight rested upon?

But what would be the measure of Hickman's recovery, in the above case, against Taylor, the third co-surety, and against Pearson?

One father enquiry on this supposed case, and we leave it. Can McCurdy now say he was less benefited by his extinguishment of his own debt in the transaction with the Bank of Kentucky than Hickman would have been by the purchase of that debt?

Suppose I mortgage ten thousand dollars worth of property to my creditor, to secure the payment of my own debt of that amount; and at the same time

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mortgage a separate tract of land, to secure another debt for \$5,000, for which I am bound, as the surety of an insolvent debtor, to the same creditor; and afterwards, the property, I had thus mortgaged, falls in value, until the whole is worth but \$9,000, and I become insolvent, so that the creditor can hope for pavment from no other source but the sale of the property, and therefore wishes to obtain immediate possession, and avoid the expenses of a suit; and it is therefore agreed between me and the creditor, that I shall release my equity of redemption in the whole property, or, which is the same thing, make a new absolute deed; and that, in consideration thereof, satisfaction shall be entered for both debts; and it is all done:—could I, in consequence, in a court of equity, or any where else, demand a decree against my unfortunate principal for *three thousand* dollars, to be played over his head the balance of his life? Could I, who had thus paid off to my creditor my own debt, with a loss to him of at least *two thousand* dollars, and satisfied *both* debts with less than I owed *myself*, thus *speculate on my own compounding of my own debt*; and in this way turn the *loss* my creditor suffered into my *gain*, on an account against my debtor? I had pledged but one thousand dollars worth of property for the debt I was bound for as surety, and the property I pledged for my own debt, was two thousand dollars short of being sufficient, and this sum my own creditor loses, besides his loss of the greater part of the other debt; but I contrive to *gain* exactly the \$2,000 in the operation, besides getting off my own debt at the discount. And can this be called a “*fair business transaction*”? No. It is impossible. But let us enquire more closely into the *principle* of this matter. On what ground could I assert the claim? The last contract with the bank was, it is true, an *unit*—one operation—one sale of my property; and if I had before made no mortgage whatever, but had held the property all free, with the title in my own hands, to dispose of as I pleased, and had made the sale to my creditor of the whole property for a full release of both these debts, then there would have been some ground for my claiming of my

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principal the three thousand dollars. In this case, both debts being equally secure to the creditor, or rather insecure, the supposition might be, that each debt may have been compounded at the same discount. I must, however, say, that in my opinion, there is still an objection to the claim, which no honest man could get over, and that is this—in order to support it, we have to give to the transaction a form and effect contrary to the common and proper feeling of mankind, by which every one is bound to apply his property to the payment of his own debt in preference to that for which he is bound as surety. If I had, as in the case put, applied my property on my *own* debt, I would have lost nothing by paying it all for a release of that only; and I would therefore say, it would not be honest or honorable in me to say *I had* applied the property *equally* to both the demands. But I will not pursue this matter. Perhaps, where all the property paid was free of incumbrance, and each debt was equally secure, or insecure, the court might compel the principal to contribute *pro rata*. But that was not the case. My property was already bound, and beyond my control, except the *worthless* equity of redemption, which I gave up. On each of the two mortgages I yield two noughts; and for that, I claim two thousand dollars. And is this correct arithmetic? Not among the solvent men? And the rules of mathematics, at least, are the same for all. The plain truth is, I lost nothing in the transaction but the property I mortgaged to secure the payment of the debt I was bound for as surety. *This was all I applied to my principal's use.*—But suppose, in the stead of the two mortgages, I had given but one on eleven thousand dollars worth of property, and had stipulated that the proceeds should be applied, *first*, to the payment of my own debt, and afterwards to the other debt, and I had subsequently sold the property to the creditor, or any other, for this sum, and it had been applied accordingly—What then? Or suppose I had made the mortgage to secure my own debt only, and had afterwards released the equity of redemption, in consideration of an acquittance from both the debts, my own of \$10,000, and the surety debt

of \$5,000—is not the case the same exactly, in principle, as that stated next above? In *that* case, the mortgage was for both debts—mine to have the preference; whilst in *this* case, the mortgage having embraced my own debt only, it of course had the preference to be first extinguished by the proceeds of the sale. It is too plain: and this is the case under discussion.

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The error, in the opinion delivered by the court, is in the omission to enquire into the amount McCurdy parted with for Pearson and Hickman's use. McCurdy did not part with the *legal* title to the property in order to satisfy Pearson's debt, but only his *equity of redemption*.

Suppose this had been sold under an execution, on the judgment recovered by the bank against Pearson and his sureties; and suppose it had sold for its exact value, the difference between McCurdy's debt and the \$2,250, how much would McCurdy have been entitled to recover? Certainly not more than the equity of redemption sold for: and can be entitled to recover more, because he *himself* sold exactly the same interest in the same property, for exactly the same amount, for the same purpose.

We will state another case. Suppose Hickman had gone to the bank, and told the president that he could, by the assistance of his friends, raise a few hundred dollars in order to obtain a discharge, and that he would pay the bank \$2,250 for a discharge against this surety debt, and an assignment of this debt upon McCurdy, and the bank had agreed to his proposition, and made the assignment accordingly. Now, what would be the measure of Hickman's recovery against McCurdy as the co-surety? Could he first have the amount of McCurdy's own debt he had thus purchased, first made for him out of the property, and then turn about and say that both of the debts were equally bad, or doubtful, or good, and that, therefore, he had bought them each at the same discount; and that, therefore, McCurdy should contribute, as co-surety, by the rule the court have given us, to work out Hickman's liability? Hickman, by his purchase of the debt on McCurdy,



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become the assignee of the mortgage, and of course entitled to the mortgage debt out of its value. Suppose then he proceeds with the suit in chancery the bank had on the docket, and the house and lot is sold for the \$2,250, and Hickman purchased it himself. Now, how is the matter to be settled? Hickman is exactly even. He paid \$2,250, and has that value of property, except that he had given a bond, when purchased at the commissioner's sale, for the difference between McCurdy's own debt, secured by the mortgage, and the \$2,250.

One more case only.

Suppose I am insolvent; that I am bound to one creditor, in two several obligations, and for one hundred dollars; in one as the surety for an insolvent man, and in the other for a person entirely solvent, but the person absent, and the creditor wants the money, and I have the credit to borrow, upon my pledge to restore it when reimbursed by my principal; and the creditor proposes that if I will pay him one hundred dollars, he will surrender to me both obligations, and I obtain the money and pay it.— Shall my solvent, but *unprincipled* principal be allowed to tell me, on his return, that I *compounded both debts*, and had paid for his debt but fifty dollars, and I am sued, therefore, for the other half the money, after my *insolvent* principal.

This case is put to shew, that in all such cases the court must ascertain what portion of the money was paid for each debt, and there is no more difficulty in it than there is in the case of one of your fraudulent retailers of spirits, who *sells his apples and gives away his whiskey*.

The court have recognised the principle which this petition labors to establish, in having itself valued the house and lot on the testimony, instead of taking the nominal amount at which it was "called" by the Bank and McCurdy in their settlement. If the value of the thing itself, the entire estate in it, is the proper criterion, when it is *all* paid by the surety in satisfaction of the debt, surely, when only an equity of redemption is paid, the real value of *that* ought to be the standard.

I will not add to this long paper by an apology for its length. If I am wrong, there can be no good apology; and if I am right, none is necessary.

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## Hall's Lessee vs. Pearl.

Error to the Lincoln Circuit; BRIDGES, Judge.

Case 165

*Act of 1815, which provides for the appropriation of the waste lands of this state.*

Chief Justice Robertson did not sit.

October 17

Judge Underwood delivered his opinion as follows:—

HALL, in virtue of a Kentucky land office warrant, obtained a patent, in 1817, for 105 acres of land actually possessed by Pearl, and, in 1824, instituted this action of ejectment to recover the possession.

Pearl, to defend himself, gave in evidence an entry for 400 acres made, by virtue of a preemption warrant, in January, 1782, in the name of Benjamin Roberts, assignee of William Hicks; and likewise a survey for 300 acres made, by virtue of part of a Virginia treasury warrant, in November, 1797, for Thomas Quirk, assignee &c.

It was admitted, that both the entry and survey covered the land included by the patent to Hall. Upon this evidence, the court, in substance, instructed the jury, that if they believed the entry and survey covered the land in controversy, the patent to Hall passed no title, and they should find for the defendant.

The jury found for the defendant, and Hall prosecutes a writ of error with supersedeas.

Whether the instruction given by the court is correct, constitutes the only question.

The act of 1815, II Dig. 806, intended to provide for the appropriation of waste and unappropriated lands. The tenth section of the act, with a view to

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Tenth section  
of the act of  
of 1815, which  
provides for  
the appropri-  
ation of the  
waste and  
unappropri-  
ated lands of  
this Common-  
wealth, dis-  
cussed.

quiet litigation, as is expressly declared, enumerates certain descriptions of land which shall not be appropriated under the provisions of the act, and likewise specifies certain claims which shall be deemed superior to surveys made upon warrants obtained by virtue of the act. If Pearl has shewn that the land in controversy fall within the description given by the statute, of land not subject to be appropriated under its provisions, then there can be no doubt of the correctness of the instruction; for there could not be a more palpable contradiction than to assert that the land in controversy was such as the statute prohibited from appropriation, and that it had nevertheless been appropriated under the provisions of the statute. Moreover, if Pearl has shown a claim which the statute declares shall be deemed superior to Hall's, the instruction would be regarded as correct. For, by the act of 1815, the survey is made the commencement of title, and any claim which, in the language of the act, "shall be deemed superior to surveys made upon warrants obtained by virtue of the act," must have the effect of preventing the title from vesting in such land warrant claimant, otherwise it could not be "*deemed superior*." It will not do to say that the meaning of the act in such cases is, that the claims intended to be protected by the 10th section shall be deemed *superior* in equity but *inferior* in law. The language used authorizes no such construction. The policy of the legislature was to make them *superior* every where, so that the speculator might not be gratified by partial success, or thereby have it in his power to make beneficial compromises by operating on the fears of his adversary. Whatever, therefore, may have been the old rule, or the current of decisions imparting an almost unimpeachable validity to patents emanating under former statutes, I cannot give to them, when founded on the act of 1815, a character too sacred to be touched by the common law tribunals. I see no sufficient reason for driving a party to the chancellor for relief under this statute, when the mere identification of his claim, if it be such an one as is protected by the 10th section, would entitle him to a decree. An inquiry into the nature of the claims

offered in evidence, by Pearl, will, under the foregoing principles, determine the propriety of the instruction.

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First, then, in relation to the entry in the name of Roberts. It does not appear that this entry was ever surveyed. By an act of the Virginia legislature, passed in 1785, 1 Litt. Laws, 454, unless the owner of the entry in question attended with chainmen or marker, or appointed an agent, in case he lived out of the county, as required, his entry became void. There is no evidence shewing that the owner of this entry ever complied with the law in this respect. Many acts of indulgence were passed both by Virginia and Kentucky. The last indulgence act passed by Kentucky, extending the time for surveying such entries, expired in 1798, so that it seems this entry was void long before the passage of the act of 1815 for appropriating waste lands, and that there was no act in force authorizing it to be surveyed, unless its owner labored under some saving disability which is not proved. Now, does the act of 1815 when, in the tenth section, it declares "that all *entries* heretofore made, which by the laws of the time being were authorized to be made, shall be deemed superior to surveys made upon warrants obtained by virtue of this act," intend thereby to give life and energy to a *void* entry? I think the act was not designed, nor can it have that effect.—An entry which has become void is as though it never existed. The act of 1815 does not purport to repeal the laws under which Roberts' entry became void, and to infuse into the entry new efficacy. So long as these laws remain unrepealed and in force, Roberts' entry is a nullity, and was so before the passage of the act of 1815. That act by the expression "*entries heretofore made*" intended to include such entries as at the time of its passage continued to subsist and possessed validity as entries. Roberts' entry, made in 1782, had ceased to be an entry, and, therefore, when the legislature are speaking of entries, it would be a strange construction to consider them as including nonentities. This void entry, in the name of Roberts, did not, therefore, in my opinion, justify the instruction.

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SEE  
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The survey in the name of Quirk is next to be considered. It has been the uniform doctrine of this court since the decision in the case of Patterson's devisees vs. Bradford, Hardin, 104, that a survey, unless made in pursuance of the entry, is not an appropriation of the land. The survey, *per se*, confers no title. Surveys made under the act of 1815 constitute an exception to the rule. The 10th section of the act of 1815 protects titles founded on surveys made before the passage of the act, notwithstanding the entry on which the survey was founded may be vague, or notwithstanding a departure in the survey from the calls of a good entry. This may enable a younger grant, founded on such a survey, to overreach an elder grant founded on a Kentucky land office warrant, but it cannot, in opposition to the long settled doctrine, convert surveys into titles. Besides, no authority whatever for making the survey of Quirk has been shewn. This survey alone, then, without an entry or patent to support it, proved nothing in behalf of Pearl.

It cannot be said that the land in controversy could not be appropriated under the provisions of the act of 1815, on account of its being land forfeited to the Commonwealth. That an escheat or forfeiture of lands to the Commonwealth, for any cause, does not extinguish the title forfeited so as to render the land waste and unappropriated, and thereby to bring it into market under the general laws for appropriating vacant lands, is clearly settled by the cases of Elmendorf vs. Carmichael, III Litt. 481, and Stith &c. vs. Hart's heirs, VI Monroe, 624. But Pearl has failed to bring his case within the influence of this principle, for he has not shewn that there ever was a title to the land in controversy in any one, and that the title so existing had vested by escheat or forfeiture in the Commonwealth. A forfeiture of Quirk's survey could not vest title in the Commonwealth, unless Quirk himself had a title to the land in dispute which he could part with by forfeiting his survey. The land in contest does not, from any thing apparent in the record, seem to be of that description which could not be appropriated by the act of 1815. In every view, therefore, which

I have been enabled to take of the case, I am of opinion, that the circuit court erred in the instruction given.

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The judgment of the circuit court is reversed, and the cause remanded for a new trial.

But as Judge Nicholas and myself do not agree in our reasoning, we cannot prescribe the principles which shall govern another trial. I can say for myself that the defendant may impeach the plaintiff's patent, if he can make out a proper case. We unite in giving the plaintiff in error a judgment for costs in this court.

*Green*, for plaintiff; *Owsley*, for defendant.

Judge Nicholas, dissenting, delivered his own Opinion as follows :—

I concur in reversing this case, but for different reasons from those given by Judge Underwood.

I do not consider the patent of Hall contestable in a court of law, on the ground that it embraces land appropriated by entry or survey made previous to the act of 1815. See *Bledsoe vs. Wells*, IV Bibb, 329; *Ross vs. Barland*, I Peters, 664; *Jennings vs. Whitaker*, IV Mon. 50. I do not think the tenth section of that act, when properly construed, meant to confer any superiority upon such entry or survey, when valid, over surveys made upon warrants issued under the act, but simply to confer such superiority upon entries otherwise invalid for vagueness, and upon surveys not made conformable to entry. The former class of entries and surveys did not need legislative aid to confer superiority upon them—they already had it; the latter class had it not, and it was therefore the intention of the legislature to confer it upon them. This construction gives full scope and pertinent application and operation to every word in the first member of the tenth section. The opposite construction enlarges and strains the language beyond its necessary and natural import, contrary to the well established rule for construing all statutes which are in derogation of the general

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rules of law. But if the legislature, from superabundant caution, does say, and did mean to say, that all entries and surveys theretofore made, should be superior to surveys thereafter made, it is then but in affirmance and declaratory of the law, as it would have been without the act, and that the character of superiority intended to be conferred, was only such as similar claims theretofore had over adverse surveys. That is an equitable superiority, to be enforced according to the then well established usages of law in a court of equity, and not in a court of law.

The act only makes surveys the commencement of title as against other surveys made under it, not as against entries and surveys theretofore made, and for the plain and obvious reason that it would be impracticable for the former to compete with the latter as to priority in point of time.

I can perceive no more absurdity or contradiction, in the assertion, that the land in controversy was such as the statute prohibited from appropriation, and that it had nevertheless been appropriated, than would arise from a similar affirmation with regard to any junior or second appropriation of land, under any other of the various systems known to the land laws of Virginia and Kentucky. Under none of them could there be more than one valid and rightful appropriation of the same land. When a legal appropriation was once made, every subsequent appropriation of the same land was illegal and prohibited. Yet notwithstanding the supposed absurdity, the courts of this state and Virginia for the last fifty years have uniformly, and in countless instances, in all proceedings at law, sustained the elder grant, though issued upon such subsequent illegal appropriation.

So far as regards this case, the only inhibition to be gathered from the act of 1815, against the appropriation of the land by the plaintiff, is that contained in the first section, which merely authorizes the location under it of waste and *unappropriated* land, from which the inference is fairly deducible, that the location of appropriated land was not permitted. A similar inhibition, in almost the precise same form,

is to be found in every land system that we have ever had. HALL'S LES-  
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When forming this new land office warrant system, whether it would not have been good policy in the legislature to subject all conflicting titles, likely to grow out of it, to the test of a single adjudication in a court of law, is an enquiry with which I have nothing to do. I will cheerfully acquiesce in that course when it shall be prescribed in language sufficiently explicit to be understood. But if it be permitted to express my individual opinion, it would be, that true policy dictated the inhibition of any investigation behind or *dehors* the patents. That the eldest patent should be made to prevail in all cases both at law and equity. It is my belief that among the ablest and most experienced jurists of our state it has caused continued and increasing regret, that this course had not been taken by our courts in the early and original adjustment of this question; that they had not refused to permit the elder patent to be invalidated for any cause whatever except that of actual fraud in its obtention. If this view needed confirmation from the opinions of enlightened jurists out of the state, it has the strongest and most direct sanction from the supreme court in the case of Polk vs. Wendell, V Wheaton, 293. It is there said, "long experience had satisfied the mind of every member of the court of the glaring impolicy of ever admitting an enquiry beyond the dates of the grants under which lands are claimed. But the peculiar situation of Kentucky and Tennessee with relation to the parent states, Virginia and South Carolina, and the statutory provisions and course of decision that have grown out of that relation, has imposed on this court the necessity of pursuing a course which nothing but necessity could have reconciled to its ideas of law or policy."

Entertaining this opinion upon this part of the case, it is unnecessary for me to express any upon any other branch of it. We concur, that upon the case, as made out, the plaintiff ought to have recovered.

Wherefore, the judgment must be reversed, with costs, and cause remanded for new trial.



CHANCERY. **Alexander vs. The Bank of the Commonwealth.**

Case 166. Error to the Nicholas Circuit; BROWN, Judge.

*Surety. Replevin bonds. Stay of execution. Release.*

October. 18. Chief Justice ROBERTSON, delivered the opinion of the Court.

JESSE ALEXANDER filed a bill in chancery to be relieved as the surety of Thomas Alexander, in a replevin bond to the Bank of the Commonwealth.

He alleged that a *fiery facias* (issued on the bond) had been levied on the estate of the principal obligor, and afterwards stayed by order of the attorney at law of the bank; and that the estate, sufficient to have satisfied the execution, had been released.

The bank denied that "any stay of execution was ordered by their privity or consent, or that any stay of execution was ever ordered by their authorized agent or attorney."

In an amended bill, which was not answered, Alexander alleged that Henry Warfield was the "agent and attorney" of the bank, and that the execution was stayed by his order, and without the consent of the complainant.

The depositions of Thomas Alexander, Thomas Moore, Peter Shutts, Henry Warfield, and William H. Thompson, were read on the hearing of the cause, and constituted the only evidence, except what may be deduced from the bills and answer, the sheriff's return, and the date of a subsequent execution.

The circuit court having dissolved the injunction and dismissed the bill, this writ of error is prosecuted to reverse the decree.

The objection made here (for the first time) to the deposition of T. Alexander, cannot be sustained; because, 1st, his liability to each party appearing from the facts, to be equipollent, he should be deemed competent; and, 2nd, as no objection was made to his deposition in the circuit court, we must presume that all objection was waived. Breckenridge vs. Todd, III Monroe, 57.

T. Alexander swore that the execution was stayed by the order of Warfield, the agent of the bank, in consequence of an arrangement between Warfield and himself, for a renewal of his note in bank, on payment of costs, interest, &c.

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COM'LTH.

Moore and Shutts swore that the estate levied on belonged to T. Alexander, (the principal debtor) and would have satisfied the execution.

Thompson swore that he, as deputy sheriff, had levied the execution on the property of the principal, and had afterwards returned it "stayed," in obedience to the order of Henry Warfield, the agent; but, on cross examination, he said that he had no recollection of the facts, and knew only what his return, "*stayed by order of plaintiff's attorney*," declared as to the cause of staying the execution.

Warfield swore that, "as agent and attorney of the bank," he told T. Alexander that he could be "reinstated by paying *costs, calls, &c.*" and renewing his note in bank; that he had paid "*the costs, calls, &c.*" but had, as he had understood, never renewed his note; but that he had, as he believed, paid him his fee and obtained his receipt therefor; and he then concluded as follows—"I never did *instruct* a stay of execution in the case, or *any other of the bank*, except upon a compliance with the requisitions of the bank before stated, which, as I have before stated, were not complied with in this case."

It is the opinion of this court that the plaintiff is entitled to relief, and that the circuit court erred in dismissing his bill.

The credibility of the official return; the positive testimony of T. Alexander; the belief of the officer himself; the time (nearly two years) which elapsed from the return to the date of the next execution on the replevin bond, constitute a formidable body of evidence, tending strongly to prove that the execution was stayed by the order of Warfield, as the agent of the bank, and that the property was actually released. The deposition of Warfield himself, when scrutinized and reasonably applied, furnishes but slight countervailing evidence.

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COLUMBIA.

He admits that if T. Alexander had paid the "*costs, calls, &c*" and renewed his note, he would have been "*reinstated in bank*," and that he had told him so. He admits that he had paid the "*costs, calls, &c.*" and his fee, but says he was not *reinstated* because he had not also renewed his note; and avers that he never did, in any case, instruct a stay of execution, except upon a compliance with the requisitions of the bank."

He does not swear that he did not *authorize the deputy sheriff to stay the execution* and release the levy. The execution was pressing upon the principal debtor; the day of sale was approaching; and, believing that the note would be renewed, Warfield may have considered the arrangement as fulfilled, and the terms virtually complied with, by *being agreed to*, and by the payment of his fee, &c. and this is rendered the less impossible by the fact that a *stay of execution* only gave time for "*complying with the requisitions of the bank*," but a full compliance by T. Alexander, according to his agreement with Warfield, would have "*reinstated*" him in bank.

If, after a *fi. fa.* issued on a replevin bond has been levied on estate of the principal obligor, sufficient for its satisfaction, it be stayed by order of plaintiff, and the property released, the surety in the replevin bond is thereby released, in equity, from the obligation of the replevin bond.

Warfield's deposition is insufficient to counterpoise the opposing proof, especially as the bank, by failing to answer the amended bill, virtually admitted that Warfield, as its agent, ordered the stay of execution, and as it also tacitly admitted the same thing by acquiescing in the official return on the execution, as may be inferred from its failure to move for a quashal, or to proceed against the officer for a false return, or even to issue another execution for nearly two years, and these facts tend also to prove that Warfield did not exceed his authority; besides, as it must be conceded that he was the "*agent*" of the bank, his power must be deemed to have been plenary, the contrary not appearing. His act was, therefore, the act of the creditor; and, by releasing the property of the principal debtor (as seems to have been the case here) without the assent of the surety, and thereby increasing his risk and destroying a lien, the bank has, in equity, released the plaintiff from his pre-existing liability as a co-obligor.

Wherefore, the decree of the circuit court is re-

versed, and the cause remanded, with instructions to  
perpetuate the injunction.

*Haggin*, for plaintiff; *Crittenden*, for defendants.

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VS.  
STRAUGHAN.

## Burgen vs. Straughan.

APPEAL.

Error to the Madison Circuit; FRENCH, Judge.

Case 167.

*Bastardy. Promissory note to pay money for maintenance of bastard child.*

Chief Justice ROBERTSON delivered the opinion of the Court.

October 19.

"I promise to pay Ann Woodruff or her order, the just sum of twenty dollars Commonwealth's paper, it being in consideration of her youngest son, which she says Jacob Straughn is the father of it—and in consideration of the same she receipts in full against the Commonwealth and all other charges—the money to be paid by the first day of January, 1828. Given under my hand and seal this 3rd day of April, 1824.

"JACOB STRAUGHAN. Seal.

"PATSY WOODRUFF."

Other notes of the same kind were executed at the same time.

Upon an appeal to the circuit court, from a judgment rendered on the foregoing note in favor of the plaintiff in error, as assignee of the obligee, the court, considering the contract void on its face; would not permit the note to be read to the jury; and consequently, verdict and judgment were rendered in favor of Straughan.

When promissory note recites two considerations, for promise therein contained, and either of them be inconsistent with law, morality, or public policy, the whole note is vicious and void.

It may be admitted that the note discloses two considerations. And it cannot be denied that if either of those considerations be inconsistent with law, morality, or public policy, the whole contract must be deemed vicious and void.

The first consideration, whether it be considered *past* cohabitation or the obligation to contribute to the support of the defendant's own child, is unquestionably legal and valid. Although it is not easy to ascertain the precise nature and import of the last consideration, nevertheless it may be admitted to be

*Past* cohabitation or an obligation to contribute to support one's own bastard child, are either of these

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an agreement by the obligee not to proceed against the obligor, under the bastardy act of 1795, for maintainance of her child, or to claim any other contribution from him as the putative father; and still it does not appear to us to be either immoral, illegal, or inconsistent with public policy.

The object of the statute of 1795, 1 Dig. 178, is to secure, in a summary mode, a natural right, and to enforce a natural obligation. If the father fail to maintain his bastard child, the burthen devolves on the mother. He is under an obligation, therefore, to both the mother and the child; and the act of 1796 has given *her* the right to compel him, *if she choose to do so*, to maintain, or assist her in maintaining their illegitimate offspring. This statutory right is clearly a civil right, and the remedy prescribed, though anomalous, is a civil remedy. The proceeding is not in the nature of a criminal or public prosecution, *for a public wrong*; nor is there any thing in it that should be deemed *penal*: and consequently, there is nothing in the consideration of the note which can be deemed the compounding of a criminal prosecution or of a penal action; nor can we perceive how it can be unlawful or immoral, or inconsistent with the policy of the law, for the mother of a bastard to agree with the father that, if he will co-operate in the maintainance of their child, she will not proceed under the bastardy act, to degrade and compel him, and thereby also expose herself to unnecessary humiliation. Such a contract is not incompatible with any civil or social duty. It should not be deemed injurious to the community or county. It is not the public duty of the mother of an illegitimate child to assert her statutory right. Her voluntary forbearance is no breach of any moral or civil obligation. Her child may become a burthen to her county; but this might happen, and would, perhaps, be more likely to occur, if such contracts as that we are now considering should be declared illegal and void. Many, in her condition, might prefer all the wretchedness of destitution and poverty, to a voluntary promulgation, in a county court, of all the circumstances necessary to coerce contributions under the bastardy

legal and valid considerations sufficient to uphold a premissory note.

Right of the mother, under the act of 1795, to compel the father to maintain his bastard child is a civil right, and remedy is a civil remedy. Proceeding is not in nature of a criminal or public prosecution for a public wrong. Nor is there any thing in the proceeding that should be deemed *penal*.

Agreement by mother of a bastard child, with the father, that if he will contribute to the maintainance of their child she will not proceed against him under the bastardy act, is not unlawful, immoral, or inconsistent with the policy of the law.

act. Have the county courts power to originate an enquiry under that act, or to compel mothers of illegitimate children to do it? If they have, the agreement of the obligee in this case cannot impair that power or obstruct the effectual exertion of it; if they have no such power, then the obligee had a perfect right to make the contract which she did make. In that way she may have effected an end, the accomplishment of which she never would have attempted in any other mode, and may thus have attained all the benefits secured to her by the statute.

BURGEN  
VS.  
STRAUGHAN

It is not necessary to decide in this case, whether or not the agreement of the obligee would bar any proceeding which she might hereafter choose to institute against the obligor, under the bastardy statute of 1795. It is not improper, however, to suggest that, if she could still enforce that act, and should hereafter do so, she might be legally liable, to some extent, for a breach of her contract.

Has county court or any of its officers, *ex officio*, a right, under the common law or the statute of Elizabeth, to institute any proceeding to compel the father of a bastard child to maintain it, if it would otherwise become a charge on the county?

Nor is it properly within the range of this case, to enquire whether the county, or any of its officers, would have power, under the common law or the statute of Elizabeth, to institute any proceeding, *ex officio*, for compelling the defendant in error to maintain the child, if it be his, and would otherwise become a charge to the county; for no such power is given by the act of 1795, or was contemplated by it. And therefore, if the effect of the obligee's agreement be that she would not proceed against the obligor under that statute, which she might have enforced or not, according to her own free will, she did nothing which she had not a perfect legal right to do. If the defendant be compelled to pay her what he promised, who will be wronged? If she comply with her promise, who can say she had not the legal right to do so? What principle of morality—what law—what public policy will have been disregarded? None as we can perceive. The act of 1795 was intended to benefit her. It does not apply to those only who are poor; but embraces the rich as well as the poor. It is not because the mother may be poor that the act of 1795 allows her to compel the father to contribute to the support of their spurious offspring; but it is because she *should* have the

Bastardy act of 1795 does not give the county court nor any of its officers a right, *ex officio*, to institute any proceedings in order to compel father to maintain his bastard child, but vests the sole power of originating such proceeding in the mother.

If the father of bastard child agree with the mother to contribute to the

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EXECUTORS  
vs.  
THOMPSON'S  
ADM'RS.**

maintainance  
of the child,  
and in con-  
sideration  
thereof the  
mother agrees  
not to prose-  
cute him for  
its maintain-  
ance, under  
the act of  
1795, the a-  
greement  
will be en-  
forced against  
him.

right to coerce such contribution against the father, whether she be rich or poor: For *his* duty to maintain his own child does not depend on *her* inability to do it, but on the natural relation which he sustains to a helpless being whom he contributed to bring into the world. Such is the policy—such the effect of the statute of 1795.

Then, if the father of a bastard agree voluntarily to contribute, as he ought to do, to the maintainance of the child, provided the mother will agree that she will not harrass and expose him under the act of 1795, the agreement should be enforced against him.

Wherefore, the bond does not seem to be void; and consequently, the judgment of the circuit court is reversed, and the cause remanded for a new trial.

Caperton, for plaintiff; Turner, for defendant.

## CHANCERY. **Bryan's Executors vs. Thompson's Administrators.**

Case 168.

Error to the Garrard Circuit; BRIDGES, Judge.

*Joint administrators. Release of a cause of action by one administrator. Co-executors.*

October 19.

Judge UNDERWOOD delivered the opinion of the Court.

Chief Justice ROBERTSON did not sit

THE defendants in error filed a bill to be relieved against the payment of money on account of usurious contracts and exactions made by the testator of the plaintiffs from the defendant's intestate, when they were both alive. It appears that since the death of the testator and the intestate, their representatives came to a settlement, when the representatives of Thompson executed new notes, and at the same or a different day, one of the administrators executed a release to the executors against all actions growing out of the usurious contracts.

The circuit court disregarded the release, and perpetuated the injunction. We deem it unimportant to enquire into any thing but the validity of the release.

We regard the consideration of the release as sufficiently made out. The release must, therefore, have its effect, unless it be incompetent for one of two administrators to release a right of action.

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EXECUTORS  
VS.  
THOMPSON'S  
ADM'RS.

This question is one about which there are contradictory decisions to be found. Lord Hardwick, strengthened as he said by the "opinion of a very great man, Lord Bacon," decided in the case of *Hudson vs. Hudson*, 1 Atkyns, 461, that the release of one of two joint administrators would not bar the other. But the author of the *Touchstone* makes a quere as to this point. See *Shep. Tou.* 484-5. The master of the Rolls, in *Jacomb vs. Harwood*, II Ves. 265, said, that it was held in the case of *Willand vs. Fenn*, in B. R. "that one administrator stood on the same ground and foundation with one executor." If this be true, there can be no doubt that one of two administrators may release a right of action; for all the books lay it down that one executor may do it so as to bind his co-executors. Toller on Executors, page 407, notices the point and refers to the authorities on both sides. He concludes, however, with the declaration, "that a joint administrator stands on the same footing, and is invested with the same powers as a co-executor." II P. Wm. 121, is cited in addition to the case in *Vesey*.

One of two joint executors may release a cause of action which belongs to the estate of his testator.

It seems to be well settled that where administration is granted to two, and one dies, the survivor shall be sole administrator, upon the ground that the office survives to him. In this respect there is a strict analogy between the joint administrator and executor. Toller, 114.

Where administration has been granted to two, and one dies, the survivor is sole administrator, upon the ground that the office survives to him. One of two joint administrators, like one of two joint executors, may release a cause of action which belongs to estate of his testator.

The reason which seems to have influenced those who contend for the difference between the power of a joint administrator and executor, grows out of the fact that executors are appointed by the testator, whereas administrators are appointed by the ordinary, in this state by the county court. We do not perceive any good reason for declaring that there is a difference between the powers of a joint administrator and a joint executor, because their appointments spring from different sources. The testator may make the appointment of two or more execu-



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 VS.  
 GRIFFIN.

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tors, without expressly providing, by his will, that each shall have power, separately, to release a debt; and yet the law regulating their authority, confers on each such a right and power. Where the proper tribunal appoints more than one administrator, it is in like manner a question of law, how far one can act without the other, and why the law should refuse to trust the agents of its own appointment, when acting separately, and give validity to the acts of agents separately performed, when they have been jointly appointed by a testator, we cannot discern.

The situation and circumstances of the estate of an intestate, may often render it prudent, if not absolutely necessary, to appoint more than one administrator. The same kind of necessity may require that one alone should act. As a question of policy, therefore, we should be inclined to sustain the more modern doctrine, that a joint administrator stands upon the same footing with a joint executor. And for the purpose of uniformity in the doctrine applicable to the personal representatives of the dead, we shall determine such to be the rule.

As we are of opinion that the consideration of the release is sufficiently made out, and as we see no reason why the parties might not adjust and compromise, and release the usury, as well as they might settle any other matter of dispute or difference, the decree must be reversed, with costs, and the cause remanded, with directions to dissolve the injunction and dismiss the bill.

*Crittenden, for plaintiff; Owsley, for defendants.*

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INDICTMENT.

## The Commonwealth vs. Griffin.

Case 169.

Error to the Shelby Circuit; TODD, Judge.

*Slaves, importation of into this state.*

October 20. Chief Justice ROBERTSON delivered the Opinion of the Court.

THIS is an indictment for illegally importing a female slave into this state. On the trial, the attorney for the Commonwealth moved for sundry instructions, all of which the court refused to

The bringing  
 of a slave into  
 Kentucky, by

give, and thereupon verdict and judgment were rendered for the defendant in error.

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VS.  
GRIFFIN.

The instructions as, offered, when reduced to their true effect as applicable to the facts proved, may be resolved into one isolated question; and that is, whether the bringing of a slave to Kentucky, by a person not protected by any of the exceptions in the statute of 1815, II Dig. 1162, intending to export, and afterwards actually exporting the slave to another state for sale, is an *importation* into this state, in violation of that statute?

a person not protected by any of the exceptions in the statute of 1815, altho' he intends to export, and afterwards exports the slave to another state for sale, is an *importation* into this state in violation of that statute.

We are satisfied that the importation of a slave into this state, for any purpose, or by any person not authorized by the statute of 1815, is an indictable offence. If the defendant actually imported a slave, not for his own use, if he did not obtain the slave by descent, devise, or marriage, or if he was not a sojourner, "using the slave for necessary attendance," he was guilty of a violation of the act of 1815, whether he sold the slave or not, or whether he kept her here or sent her elsewhere. There was no attempt to prove that the defendant was an emigrant to this state; but it was proved that he was a citizen of Kentucky; consequently, the circuit court erred in not instructing the jury, as asked, that a sale in this state was not indispensable to conviction, and that if the defendant "*bought* the slave in Virginia, and brought her to this state, without having acquired her by marriage, descent, or devise, and not for his own use, and that he was not a traveller passing through the state, they should find for the Commonwealth." The facts conduced to prove every thing hypothetically assumed in the foregoing proposition.

The importation of a slave into this state for any purpose or by any person not authorized by the statute of 1815, is an indictable offence.

Wherefore, the judgment of the circuit court is reversed, the verdict set aside, and the cause remanded for a new trial.

*Morehead*, Attorney General, for Commonwealth;  
*Richardson*, for defendant.

## INDICTMENT.

**The Commonwealth vs. Greathouse.**

Case 170.

Error to the Shelby Circuit; TODD, Judge.

*Slaves, importation of into this state. Indictment.*

October 20.

Chief Justice ROBERTSON delivered the Opinion of the Court.

THE only question presented in this case is, whether an indictment, found against the defendant for *importing* slaves into this state, in violation of the statute of 1815, charges, with sufficient precision, an indictable offence.

An indictment for importing slaves into this state, contrary to act of 1815, need not charge a sale of them.

*Importation* is one specific offence, and a subsequent sale is another and different infraction of the law. Charge of illegal importation may be sustained without proof of a sale.

An illegal importation is sufficiently charged in the indictment. If the charge as made, and reasonably construed, be admitted, there was an illegal importation of slaves by the defendant. The indictment not only charges an illegal act of importation, but shows, *prima facie*, that it was not excused by any of the exceptions of the statute.

It was not necessary to charge a sale of the imported slaves. Importation is one specific offence, and a subsequent sale is another and different infraction of the law. The sale of an imported slave is made, by the statute, evidence that the importation was unlawful. But, in an indictment for illegal importation only, it is not necessary to charge a sale, because that fact would only be *evidence* of the principal fact charged, and because the charge of illegal importation may be sustained without any proof of a sale.

We cannot perceive any substantial defect in the indictment. Wherefore, the circuit court erred in quashing it.

Judgment reversed, and cause remanded for further proceedings.

*Morehead, Attorney General, for Commonwealth; Richardson, for defendant.*

**J. C. Rodes vs. Samuel Hays.**

Error to the Fayette Circuit; HICKEY, Judge.

MOTION.

Case 171.

*Fee bills, quashed of. Jurisdiction.*

Chief Justice ROBERTSON delivered the opinion of the Court.

October 22.

SAMUEL HAYS presented to the judge of the circuit court of Fayette, a fee bill, purporting to have been issued against the said Hays by James C. Rodes, as the clerk of the county court of said county.

The record states, that the "parties appeared," and that thereupon the court, having decided that there was one illegal charge, quashed the fee bill and gave judgment against Rodes for restitution of the whole amount of the fee bill and for one dollar as a penalty.

The jurisdiction of the circuit judge is now objected to; and that is the only point which we shall consider.

If the judge had jurisdiction, it must be derived from the sixth section of the statute published in 1 Digest, 563.

That section authorizes the circuit judge of the county in which the person resides who shall have payed the amount of an erroneous or illegal fee bill, issued by a clerk, to inspect the fee bill, and (*without any notice to the clerk*) to quash it if it contain any improper item, and to give judgment for the whole amount of the fee bill and for a fine against the clerk. It also declares, that the person holding the fee bill shall not be liable for any costs, though he shall fail in his application, and that, if he shall obtain a judgment against the clerk, the execution to be issued thereon shall be endorsed—"No security of any kind shall be taken."

When a circuit judge quashes a fee bill of a clerk for illegal charges, his jurisdiction or power must be clearly shewn by the record of his judgment.

This is, at least, a harsh and extraordinary enactment; and, therefore, if it should be enforced at all, it should derive no aid from intendment or ordinary presumption. The power of the circuit judge should not be *presumed* or *inferred*, but should be clearly shewn by the record of his judgment.

The jurisdiction is limited and local.

Nor can it be delegated, or waived by the act of the clerk.

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vs.  
HAYES.

And, therefore, if the clerk appear and make no objection to the jurisdiction, a judge in any other county than that in which the applicant resides, could not enforce any judgment against him.

On a motion to quash illegal fee bill of a clerk, consent cannot give jurisdiction.

And an appearance by the clerk does not dispense with the proof of all the facts necessary to sustain the jurisdiction of the judge.

The jurisdiction is limited and *local*. It cannot be delegated or waived by the act of the clerk; and, consequently, if he should appear and make no objection to the jurisdiction, a judge in any other county than that in which the applicant resides could not enforce any judgment against him. Indeed, the statute does not seem to contemplate any litigation, and provides only for an anomalous and *ex parte* judgment.

Nor will this court, in such a case, presume, from the clerk's appearance, that he admitted that Hays lived in Fayette county. If there had been no appearance, this court could not have sustained the jurisdiction of the circuit judge by presuming that Hays' residence in Fayette had been proved. The jurisdiction could not have been inferred, but should have been shewn clearly and expressly by the record itself. *Tevis vs. Craig et al.* VI Mon. 7.

Though this court, in the case of *Tevis vs. Craig et al.*, waived a consideration of the effect of an appearance on the question of jurisdiction, it seems to us that the principle recognised and applied in that case applies as well to a case in which there shall have been an appearance as to one in which there had been no appearance; because this is a class of cases in which consent cannot give jurisdiction, and there is no more reason for inferring that facts indispensable to the jurisdiction had been proved in a case in which there had been an appearance than in one in which there had been none.

As the record does not shew that Hays resided in Fayette, this court cannot sustain the jurisdiction of the circuit judge of that county.

Wherefore, the judgment is reversed.

*Mayes, Wickliffe and Wooley*, for plaintiff; *Cowan and Haggin*, for defendant.

**J. C. Rodes vs. William Hays.**

Error to the Fayette Circuit; HENRY, Judge.

Case 172.

*Fee bills, quashed of. Jurisdiction.*

Chief Justice ROBERTSON delivered the Opinion of the Court. October 22.

At the instance of William Hays, the defendant in error, the circuit judge of Fayette gave judgment in his favor against the plaintiff in error, as clerk of the county court of said county, for the amount of a fee bill exhibited by the defendant, and purporting to have been issued by the plaintiff.

Where judgment has been rendered quashing fee bill of a clerk, and he did not appear, the record ought to shew a case of which court had jurisdiction.

There seems to have been no appearance by the plaintiff in error until after the judge had taken time and was in the act of rendering judgment. We cannot, therefore, *presume* that any fact was proved or admitted after such appearance. Consequently, so far as the question of jurisdiction is concerned, the principle settled in Tevis vs. Craig, VI Mon. 7, must be decisive. This record does not shew that the defendant in error resided in Fayette county.

Wherefore, for want of record evidence of a fact, indispensable to the jurisdiction of the circuit judge, the judgment is reversed.

*Mays, Wickliffe and Wooley, for plaintiff; Cowan and Haggin, for defendant.*

**Bell's Administrators vs. Logan.**

COVENANT.

Error to the Lincoln Circuit; BRIDGES, Judge.

Case 173.

*Receipt. Interest.*

Judge NICHOLAS delivered the opinion of the court.

October 23.

THE plaintiff in error sued in covenant upon a written agreement executed by them and the defendant Logan, wherein it was recited and agreed, in substance, as follows, to wit: That they, as administrators with the will annexed of Thomas Bell, held a note and three receipts for money on

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James Bell, of whom Logan was the executor ; that James Bell was entitled to one eighth part of the estate of Thomas Bell under his will ; that the note and receipts should rest uncollected until a settlement of the estate of Thomas Bell could be had before commissioners, and that if, after deducting the eighth part of James Bell, there should be a balance still due from him on said notes and receipts, then said Logan agreed to pay the administrators that balance. The declaration avers, that a settlement of the estate of Thomas Bell had thereafter been had before county court commissioners, and the eighth part thereof ascertained to be \$759, "which, deducted from the amount of said note and three receipts with their accruing interest until the time of settlement, left a balance coming to said administrators of \$408;" and then concludes with a breach for the non-payment of said balance.

The defendant demurred to the declaration, and the circuit court sustained his demurrer.

The only ground upon which the declaration can be sustained is, that the receipts bore interest according to their own legal import and effect, or that such effect was given to them by the covenant sued on. For without charging James Bell with accruing interest on the amounts mentioned in the receipts, the balance is in his favor and not against him.

As matter of law, a receipt for money does not charge receiptor with interest.

It is matter of discretion with the court or jury whether to allow it or not.

Recitation in a covenant of a receipt for money decided not to charge receiptor with interest, as a matter of law

As matter of law a receipt for money does necessarily of itself compel the receiptor to pay interest. It is matter of discretion with a court or jury whether to allow it or not. Nor does the covenant sued on here vary the extent of the liability of James Bell in that particular. It is merely an agreement to pay the balance that may ultimately be found due by him. Whether or not he should be charged with interest on the amounts mentioned in the receipts was to be ascertained from extrinsic circumstances. We cannot say, as a mere legal deduction, that he was chargeable with interest. There are no facts or circumstances alleged in the declaration from which such an inference could be drawn.

Nor is it even averred, in broad and general terms, that he was so chargeable, so as to allow a traverse and investigation of his liability on that score. The declaration treats it as a mere legal deduction that he was liable for the accruing interest. We, therefore, concur with the circuit court in opinion as to the insufficiency of the declaration.

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vs.  
DAMRON.

The judgment must be affirmed, with costs.  
*Monroe*, for plaintiffs.

### Cole vs. Damron.

Error to the Floyd Circuit; ROBBINS, Judge.

Case 174.

*Occupant. Rent.*

Chief Justice ROBERTSON delivered the Opinion of the Court. October 28.

THIS court having, in 1824, V Litt. 192, reversed a decree of the Fleming circuit court perpetually enjoining a judgment in ejectment, which had been obtained by Philip Cole against Richard Damron in the Floyd circuit court, and having, by its mandate, directed the circuit court to dismiss the bill, that court, on the return of the cause, appointed commissioners to assess improvements, rents, &c. under the occupying claimant law. A report returned by the commissioners having been quashed, "the case" was remanded to the Floyd circuit court, where other commissioners were appointed, and, in 1828, made a report. Shortly after which, "the suit" was abated by the death of Richard Damron. In 1830, an order was made reviving "the suit" in the name of Abraham Damron, "sole heir," and thereupon exceptions to the report were argued and overruled, and a judgment rendered in favor of A. Damron against Cole for the amount assessed after deducting *five years' rent*.

The statute of 1812, II Dig. 957, is the only legislative act applicable to the case. The act of 1820 had been repealed, and was never applicable, because the judgment had been rendered prior to its passage.



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DANSON.

See proviso to the tenth section. The act of 1825 does not apply for the same reason. See the last proviso to the thirteenth section.

We cannot ascertain from the record whether proceedings for improvements were before the chancellor or the common law judge; and it is not material which tribunal the style of the proceedings might literally import, because the same individual held the court in both capacities. If, as we presume was the case, the bill was dismissed as directed by this court, a revivor of it was unnecessary and improper; a motion, by the proper person or persons for the appointment of commissioners, would have been all that was necessary or proper, even if the suit in chancery had not been dismissed. We need not decide whether a revivor of the motion in the name of the heir only would have been proper. On the return of this case, an application must be again made for commissioners.

The judgment must be reversed for two reasons:

I. The commissioners and the court restricted the allowance for rents to five years. This is complained of, and is, we think, erroneous.

The third section of the act of 1812, after declaring that a *bona fide* occupant shall not be liable for rent prior to the judgment or decree, provides that he shall not, "*by any delay or hindrance of justice, after such judgment or decree, become chargeable with rent for more than five years.*"

Third section of act of 1812, relative to liability of occupants for rent, construed.

If occupant enjoin or supercede the judgment, and eventually fail, he is chargeable with rent from date of the judgment.

This we understand as meaning that the occupant shall not be liable for more than five years' rent in consequence of the delinquency or default of the successful claimant after judgment or decree, nor in consequence of any delay or hindrance of justice incident to a proceeding, under the occupant law, for improvements. The legislature could not have intended such manifest injustice and invasion as would be legalized if an occupant shall be chargeable with only five years' rent after judgment of eviction, even though he shall have wrongfully suspended the judgment for twenty years by injunction and appeal. If he enjoin or supercede the judgment, and eventually fail, he is chargeable with rent from the date of

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DAMMON.

the judgment. Why then, if, by either or both of these means, he suspend the judgment for ten years, should his liability for rent be restricted to five years? Such a construction is not required by the letter of the statute, and would seem to be unreasonable and unjust. "*Delay or hindrance*," after judgment or decree, means delay or hindrance in the proceeding for improvements, and not any suspension of the judgment or decree itself by injunction or appeal. The occupant may hold the land until the value of his improvements be secured by bond or by judgment; still he will be chargeable with rent during his occupancy between the judgment of eviction and the delivery of a bond or the date of a judgment for the improvements, unless the intervenient period shall exceed five years, and then he will be liable for five years only. The successful claimant may himself hasten the period when he may have a *habere facias*. If he be negligent or delinquent, so as to extend the time beyond five years from the date of his judgment, he shall not thus subject the occupant as a tenant *ad libitum*. The occupant, upon his part, may act in good faith, and proceed for his improvements with due diligence, and nevertheless the delay incident to such a proceeding, involving, as it frequently does, vexatious and controverted points, may protract the final adjustment beyond five years from the judgment of eviction. It was for such delay as this, and such only, that the limitation in the third section was prescribed.

The time during which the judgment or decree itself shall have been suspended by injunction or appeal, should be excepted from the computation; and during that time, however long it may be, the occupant should be charged with rent; and he should also account for the profits for whatever other period, after judgment, he occupied the land, not to be extended in the computation beyond five years.

In this case, Cole is entitled to rent from the date of the judgment of eviction to the dissolution of the injunction, and for the time succeeding the dissolution, if it do not exceed five years; and if it do, he is entitled to five years' rent in addition to what he has a right to during the suspension of his judgment,

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C<sup>OM</sup>'<sup>MON</sup>'<sup>WEALTH</sup>.

when neither party could have instituted any proceeding for assessing improvements under the act of 1812.

To sustain a peremptory judgment or decree against occupant for assessed value of improvements, the record must shew that occupant elected to pay for the improvements and take the land

II. The value of the improvements, as assessed, after deducting rents, exceeds three fourths of the assessed value of the land in its native state; consequently, according to the provisions of the act of 1812, Cole was not bound to pay for the improvements, unless he had elected to do so, and take the land. The record shews no such election. Therefore, the circuit court erred in rendering a peremptory judgment or decree, as it did, against Cole for the amount assessed for improvements.

Wherefore, without noticing other points, the consideration of which is not now necessary, the judgment or decree (whichever it may be deemed) for the assessed value of improvements must be reversed, and the cause remanded.

*Morhead, Wickliffe and Wooley, for plaintiff;*  
*Monroe, for defendant.*

INDICTMENT.

## Bosleys vs. The Commonwealth.

CASE 175.

Error to the Mercer Circuit; KELLY, Judge.

*Indictment. Assault and Battery. Verdict. Judgment.*

October 23. Judge UNDERWOOD delivered the opinion of the court.

Indictment against several for an assault and battery may be joint, and so may the trial, but the verdict and judgment must be several.

THREE men, named Bosley, were jointly indicted for an assault and battery committed on Demare. They pleaded not guilty jointly, were tried jointly, and found guilty jointly, by the verdict of the jury. The jury assessed their fine at two hundred and fifty dollars, and thereupon the court rendered a judgment jointly against them for the amount so assessed.

The error assigned is, that the verdict and judgment should have separately ascertained the liability of each defendant.

We think the verdict and judgment erroneous. Although the law allows a joint indictment and trial, still a joint judgment is erroneous, because there-

by one of the defendants may be compelled to pay the whole amount, and in that event he would not be entitled to contribution from his co-defendants. Thus the other defendants would escape punishment entirely, and the whole burden might fall upon him who was least blameable in the transaction. So far it would savor of punishing one man for the guilt of another.

But the point is well settled by authority, and therefore it is needless to do more than to refer to the books. See *Jones vs. The Commonwealth of Virginia*, 1 Call. 555 ; XI Coke. 42 ; II Hawkins, 633 ; Bacon's Abridgment, title Fines and Amercements, letter C. 5.

The judgment must be reversed, and held for naught.

*Owsley*, for plaintiffs; *Morehead*, Attorney General, for Commonwealth.

## S. Tribble et. al. vs. B. Frame.

Error to the Clarke Circuit; SHANNON, Judge.

*Forcible entry and detainer. Common law right of entry.*

Chief Justice ROBERTSON delivered the opinion of the court.

THIS is an action of assault and battery, instituted by the defendant against the plaintiffs in error, and is one of a multitude of suits for trespass which have originated from an obstinate and violent contest between William Frame (the defendant's father) and Samuel Tribble, (one of the plaintiffs,) about a few acres of land alternately occupied by each of them, since a judgment in ejectment, whereby the land was adjudged to be the property of Tribble's vendor.

The land had been cleared and enclosed by a fence, in the winter 1822, by a tenant holding under S. Tribble, Sr. but neither of the belligerent claimants had ever resided on it. The case of *Tribble vs. Frame et al. V Lippell*, 287, presents the material facts respecting the title, as well as those relating to the possession and conduct of the parties

TRIBBLE  
ET AL.  
VS.  
FRAME.

TRESPASS.

Case 176.

October 24.

7m599
f103 61
108 62
7m 599
e109 130

TRIBBLE  
ET AL.  
VS.  
FRAME.

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prior to the 22nd of May, 1822. In that year the ground claimed by S. Tribble and Wm. Frame, Sr. produced a crop of tobacco, planted in part by each of them, and the whole of which was cultivated occasionally by each, both of them claiming the entire crop, and the exclusive possession.

In April, 1823, one of Wm. Frame's sons had begun to plough the land. On the 30th of that month, whilst the son, who had been ploughing, was at breakfast, and when no person was on the ground, the plaintiffs in error entered upon it with a cart, and were engaged in the act of loading the cart with rails: whereupon, William Frame, Sr. having been notified of the fact, went, with the defendant in error and others, upon the land, and having enquired, in a loud voice, "*What does all this mean?*" was answered by S. Tribble, Sr. "*I am taking this fence from where I do not want it, and putting it where I do want it—and I want you to go away and not interrupt me.*" The plaintiff and one of his brothers immediately began to throw the rails out of the cart. Whereupon, S. Tribble, Sr. struck the plaintiff, and a general affray ensued. This suit is brought for a battery in that rencounter.

The plaintiffs relied on pleas setting out in legal form and manner, the foregoing facts, according to their true effect; and the jury, sworn to try the issue, found a verdict for the defendant in error for \$50 in damages; for which the court rendered judgment, after overruling a motion by the plaintiffs in error for a new trial.

S. Tribble, Sr. held the paramount title to the land, and had a perfect legal right to enter upon it. If the possession should be deemed to have been his ever since May, 1822, to the moment of the battery, there can be no doubt that the battery was justifiable; for it cannot be doubted that, as force was employed to dispossess him of the rails, he had a right to resist by striking the assailant. *McIlroy vs. Cockran*, 11 Marsh. 271.

But the counsel for the defendant insists that Wm. Frame, Sr. was in the actual possession of the land,

and had a right to repel the plaintiffs by force; and that, therefore, the verdict was right.

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Were it admitted that the facts are such as to have authorized the jury to find the state of case supposed by the defendant's counsel, it would become necessary to decide whether Frame had a legal right to resist, by force, a forcible entry by Tribble.

According to the common law, a person holding the title to land, and having the right of entry, might use actual force, if necessary, for overcoming any forcible resistance; because his right of entry being perfect, no other person could lawfully resist him in the exercise of his perfect right. The British statutes of forcible entry and detainer, declared that an entry, with *actual* force, should subject the party, so entering, to an indictment for any consequential breach of the public peace, and to restitution of possession, and also to an action of trespass. But these statutes have ever been so construed as not to affect the common law right of justifying, in an action of trespass, *quare clausum frigit*, the forcible entry, by pleading and proving a right of entry; and hence, *liberum tenementum* has, notwithstanding those statutes, been always held to be an effectual plea to the action of trespass, and thus proves that the right of entry is a right to make an actual entry on the land. Ba. ab. Forcible Entry and Detainer. A. III Ja. Law Dic. 88; III Chittv's Blackstone, 4 and 5. n. 12; Ib. 170. and notes; Sel. n. p. Whether the common law right of applying force, if necessary, to the person of the occupant, was affected by the statutes has not, so far as we know, been distinctly settled by satisfactory authority. This court truly said, in the case of Tribble vs. Frame et al. III Mon. that the right of entry does not, *per se*, give the right to use violence upon the person or personal property of the person in the possession of the land. But, in that case, there is no distinct declaration as to the right to employ force to the person, if it shall be rendered necessary to the accomplishment of the entry, in consequence of personal resistance with force. In *McIlroy vs. Cockran*, (supra,) it was correctly decided that the possessor has a right to resist, with force, a forcible intrusion. But

At common law a person holding the title to land and having the right to enter, might use actual force to effect his entry. British statutes of forcible entry and detainer have never been construed to destroy the common law right of justifying, in an action of trespass *quare clausum frigit*, a forcible entry, by pleading and proving a right of entry. *Liberum tenementum* is good plea in bar to trespass.

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whether such resistance would be lawful against a person having a right to enter, was not considered in that case. We deem it wholly unnecessary and even extra-judicial to express an opinion on that point in this case; for we are clearly of the opinion, that S. Tribble was in the actual possession of the land before and at the time of the affray, and that Frame had no right to resort to force to expel him, and, in doing so, was the aggressor.

It seems to us that Tribble was, by construction of law, in the actual possession of the land during the year 1822; for though he and Frame both used and cultivated the ground, sometimes alternately and sometimes simultaneously, as the superior right was in Tribble, the law deemed the entire actual possession his. *Hord vs. Bodley, V Litt. 68.* There is no fact that would authorize a jury to infer an intentional dereliction or actual abandonment of that possession, or an ouster by Frame during the fall and winter of 1822-3. Then, the entry by Frame, or by his son for him, in April, 1823, was *furtive*: moreover, it was not of such a character as to have operated as an actual or constructive disseizin. But if it could be deemed an ouster of Tribble's actual possession, Tribble certainly had a perfect legal right to regain his possession by a lawful entry; and it is immaterial whether he had or had not a right to apply actual force to the person of the defendant in error, in the act of entering, in order to consummate the entry, because no such force was exerted in entering. *He had entered on the land and was in the actual and rightful possession of it, using it lawfully as his own, when force was used, not to prevent a furtive entry, but to expel him after he had full and complete possession, and to frustrate his enjoyment of the land.* It cannot be shewn that actual force was employed in the act of entering; nor can it be doubted that Tribble had actually perfected his entry and was in actual possession when he was assailed by Frame. In *Tribble vs. Frame, V Littell, 88*, this court decided, upon similar facts, that Tribble must be *presumed* to have been in possession. In that case, Tribble and his son had entered, in May, 1822, on the land, and were making a fence. In this

case, Tribble and his son had entered, in April, 1823, and were removing a fence. And the court, in that case, said—"the right of Tribble to enter remained, and that right may have been thereafter exerted by his actually entering upon the land, and from the fact of his being upon the land, using it as his own, he must be presumed to have so exerted his right."

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That case must be decisive of this. The facts here are substantially the same, and evince an entry and a *pedis possessio animo clamandi*. We are of the opinion, that the jury had no right to infer from the facts that Tribble was not in the actual possession of the land, claiming and using it as his own, at the time of the battery; and, consequently, the judgment cannot be sustained unless the defendant was justifiable in forcibly attempting to take away the rails. As the land belonged to Tribble, he could not have been guilty of a trespass upon it, or upon any thing pertaining to it; being in lawful possession, he had a right to remove the rails, (especially as his tenant made them,) and the defendant had not a legal right to retake them by force. If Frame had such a prior actual possession as would have entitled him to restitution under the statute of forcible entry and detainer, that was his only lawful remedy. Being actually ousted, he had no right to use force to regain the possession. It was the policy of the statute to prevent such self-redress. And, moreover, it could not have been resorted to without defeating Tribble's right of entry. If he had been afraid to enter upon the land, he might have made a constructive entry. But he had an undoubted right to make an actual entry. He did make it, and without the exertion of actual force.

Being thus in possession, he had a right to remain, and to use, in his own way, his own property, and had a right to repel force by force, so far as became necessary to defend his possession and use. If, by entering on the land to plough it, and by beginning to plough, Frame acquired the exclusive actual possession of the land, though he had not the title, surely Tribble's entry (shortly afterwards) vested the exclusive actual possession in him, especially as the land was his.

Person having the legal title to land, and being in actual possession, has a right to repel by force, if necessary, any attempt to molest him in the enjoyment thereof, or of the free use of any thing thereunto appertaining.



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Our statute of forcible entry and detainer do not affect the common law right of entry to greater extent than the English statutes on same subject have been construed to affect such right in England.

Our statute does not take away the common law right of entry.

Person who has a right of entry and who makes an actual entry in consummation of that right, can only be removed in mode pointed out by the statute of forcible entry and detainer. Any forcible intrusion on a person so in actual possession is actionable.

And he may repel by force any forcible attempt to expel him. He must be removed *secundum legem*

The statute of 1810, of this state, cannot materially affect this case. It should not be construed as affecting the common law right of entry, or the legal consequences resulting from an actual entry to any greater extent than they had been affected in England by the statutes of forcible entry and detainer enacted in that kingdom. The statutes of England apply only to actual force. The Kentucky statute applies not only to entries with actual force, but also to entries without such force, but against the will of the person in actual possession at the time of entry. But, surely, as the statutes of England did not take away the right of entry in fact, there can be no good reason for supposing that our statute of 1810 was intended to have such an operation. In England, a person, having a right of entry, was deemed in the actual possession whenever he made an actual entry, and could not be evicted in any other legal mode than by a proceeding under the statutes of forcible entry and detainer. His entry was as beneficial, as lawful and as effectual as it would have been according to the common law, except only that he was liable to restitution under the statutes; and might have been responsible, *criminally*, for any breach of the peace committed in the act of entering. As the practical construction and operation of the British statutes had been long settled and well understood prior to the enactment of the statute of 1810, we should presume that the legislature of Kentucky intended that the provisions of that act should have the like effect, and no other, on the right of entry. And such has been its interpretation by this court. This might be shewn by many intimations; and is directly and undeniably recognized, as too unquestionable to be debated, in the case in V Littell between these same parties, and in every respect like this. We could not disturb a doctrine so firmly established by both analogy and authority.

The right of entry still exists. It is a substantial and practical right. It is useless to talk about a right of entry that is only speculative. A right of entry is a right to enter on the land to which the right is attached, and thus to obtain the possession in fact. A possession so acquired cannot be rightfully divest-

ed or disturbed in any other mode than that prescribed by the act of 1810 ; and any forcible intrusion upon it will be unlawful and, of course, actionable ; otherwise, the prescriptive right of entry would be a mere shadow. But it is, as it was anciently, solid and availing. The action of ejectment is founded upon it. And it would be difficult to shew how ejectment could be maintained in any case in which the lessor has not a *legal* right to enter on the land. The object of that action is to obtain, by the judgment of a court and the executive aid of the law, the actual possession, which the plaintiff was unwilling or afraid to attempt to acquire by his own act of entry, but which he might have thus obtained and lawfully retained unless evicted under the statute of 1810. As such an entry, by a person having the right of entry, will vest in him, by operation of law, the actual possession, he thereby acquires, as an incident, the right to maintain trespass for an intrusion upon him, and may repel, by force, any forcible attempt to expel him without legal authority. The statute itself is founded on this obvious and reasonable principle.

If a person exercise his right of recaption, even in a forcible or unlawful manner, still he has a right to retain his property when thus retaken, and to resort to actual force in defending his possession, against the former possessor.

As Tribble had a right to enter on the land, and did actually enter, and thereby obtained the actual possession ; and as Frame was in fact and in law out of possession, the subsequent entry by the defendant was without the authority or sanction of law ; and, consequently, the attempt to rescue the possession by force was wrongful, and justified the force with which he was repelled.

Tribble was actually in, and Frame was actually out of possession.

Tribble had neither done nor was doing any wrong to Frame. He had not touched any thing which belonged to Frame. He had not assaulted or menaced the person of Frame. He had entered peaceably, and without the exertion of any actual force, upon his own land in the absence of Frame, and

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was doing that and that only for which Frame could have had no cause of action against him for damages, because it was not a trespass or an injury to the person or property of Frame. If Frame had submitted to the enjoyment by Tribble of a lawful right, or had, for any supposed wrong, appealed to the law for redress, the scenes of outrage and violence which resulted from the tortious conduct of himself and coadjutors would never have occurred; and this and sundry other suits, growing out of the affray, sought and instigated by him, would never have been brought. He and his party committed the first breach of the peace, and their conduct justified the defensive acts of which some of them now complain.

Wherefore, believing that S. Tribble was in the actual possession of the land doing nothing wrongful, and believing also that the jury ought not to have inferred that he was not thus possessed, this court (Judge Underwood dissenting) thinks that the circuit court erred in overruling the motion for a new trial. Consequently, the judgment must be reversed, and the cause remanded for a new trial.

*Monroe and Haggin, for plaintiffs; Hanson, for defendant.*

*Judge UNDERWOOD dissenting, delivered his own opinion as follows:*

**Dissent.**

THE principal question in this cause, involves a doctrine calculated to operate extensively, and must have a serious influence upon the peace and good order of society. Differing in opinion with the other members of the court, I deem it proper to assign the reasons for my dissent.

The many suits between these parties, and the members of their families, have grown out of a series of battles fought in contesting the possession of a few acres of ground recovered in an action of ejectment by J. S. Smith from Frame, and sold to S. Tribble, &c.

The facts, which will clearly present the point of law, are briefly these. After Smith had recovered a writ of *habere facias* issued, and Tribble was put in

possession. Frame claimed compensation for his improvements under the occupant laws, and as he had not been paid, upon his motion, the writ of *habere facias* was quashed, and a writ of restitution awarded him under which the sheriff put Frame in possession.

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After Frame had been restored to the possession under the writ of restitution, and in the month of April, 1823, he commenced cultivating the field which had been delivered to him by the sheriff. To prevent this (as is perfectly clear to my mind) Tribble, while Frame's son had quit his plough and gone to breakfast, entered upon the land with cart and oxen and commenced hauling off the rails. Frame, learning this, went with his party, and by forcibly throwing the rails out of the cart, attempted to prevent Tribble from carrying them off, and thus to render the field useless. Tribble, resolved on effecting his object, struck Frame, who instituted this action for the battery so committed.

The defendants in the circuit court, now plaintiffs in error, asked for this instruction, "that the writ of possession and writ of restitution, and the sheriff's returns thereon, (all of which had been read without exception) had nothing to do with the controversy, and that the jury must entirely disregard them." The court refused the instruction, and the Tribbles excepted. Whether this decision of the circuit court be right or wrong is the principal point for our determination.

If the writ of restitution, and the execution of it by the officer, and his return of the fact, were calculated to shew that Frame was in the actual possession of the field; and if such actual possession on his part, justified him in repelling the entry made by Tribble, and put Tribble in the wrong, so that he could not justify the battery upon Frame, then the court decided correctly in refusing to give the instruction. But if the law be, that Tribble, as proprietor in fee of the better title, had a right to enter upon the land, and having succeeded in making his entry did, *ipso facto*, divest Frame of his actual possession, and thereby become seized in such a manner

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as to authorize him to remove every thing upon the land, and to beat any one who might offer to resist him, then the instruction ought to have been given.

It is my opinion, that Frame, by the execution of the writ of possession, was placed in the same condition which he occupied before he was turned out by the *habere facias*. It is idle to restore a tenant under a writ of restitution, unless he is thereafter to hold and enjoy all the rights which belonged to him before he was dispossessed. A writ of restitution goes upon the ground, that the tenant was improperly dispossessed, and that it is right to restore him to all that he has been deprived of; and therefore it would be suicidal to contend, that the temporary dispossession placed the tenant in any worse condition after restoration, than that he occupied before his removal.

What was Frame's situation upon the land? He had entered upon it in virtue of a junior grant. He had improved it. A judgment, in an action of ejectment, had been rendered against him. He had not been paid for his improvements. He had entered upon and improved the land common to the two patents with an intention to take possession of the whole land covered by his patent. He had been more than two years thus possessed. Smith, and those under whom he claimed, had never entered upon the lap prior to the judgment in the action of ejectment so as to oust or divest Frame of his possession. Under these circumstances Frame had the actual possession, or possession in fact, of the land. The case of *Carrine vs. Westerfield*, III Marshall, 333, shews that the occasional use or enjoyment of a thing according to the purposes for which it was designed, amounts to a continued possession in fact, where an unceasing intention exists so to continue in the use of it. The court says, "where there is an enclosure for the mere purpose of pasture, which can only be used at proper intervals, it never has been supposed that the continuity of the owner's possession was interrupted at the intervals in which his cattle were not actually grazing within the enclosure." The case of *Chiles &c. vs. Stephens*, III

Marshall, 347, shews that a possession in fact, or actual possession, may be held by a person not in fact on the land. See also *Brumfield vs. Reynolds*, IV Bibb, 358. TRIBBLE  
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The foregoing cases do, to my mind, establish beyond a doubt, that Frame was in the actual possession of the land upon which Tribble entered. His possession was acquired without fraud or violence and in perfect good faith, being invited to take possession by a patent from the Commonwealth. The 12th section of the occupant act of 1812, prohibited his removal by a writ of possession, until after the return of the report of commissioners and a judgment thereon, or the execution of bonds in pursuance thereof. He was further protected in his possession by the provisions of the act of 1819 securing the growing crop, from which, in connection with the act of 1812, it is clear to my mind that the legislature designed that the occupant should, if he pleased, cultivate the land and enjoy its use, until the question of improvements was disposed of, and a writ of *habere facias* awarded. Moreover, it seems to me, that the act of 1810, prohibiting entries into land "with any manner of force," and declaring that all entries shall be deemed forcible, within the meaning of the act, which are made without the assent of the person who, at the time of such entry, has the possession in fact of the premises, and providing a speedy remedy to obtain a restoration of the possession when invaded by force, has an important bearing upon the present controversy in favor of Frame.

I cannot admit that Tribble may rightfully redress himself, by a species of recaption, in defiance of the provisions of all these laws. I do not concede that Tribble's entry upon the land, claiming it as his own, did, at that instant, terminate the possession in fact of Frame, and invest Tribble with the actual possession. Where two are using the same land or house, and there is an apparent joint possession, the law gives the possession in fact to him who hath title. Where two are possessed of distinct parts of the land in controversy, claiming under different rights, the party having the better right is, accord-

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ing to the supreme court in the case of *Hunt vs. Wickliffe*, II Peters, 212, in constructive possession of all the land not occupied in fact by his adversary. And, according to the case of *Hord vs. Bodley*, V Litt 88, under the same circumstances, the party having the better right is in constructive possession of the whole, not excepting that occupied in fact by his adversary. Without deciding which of these rules is correct, it is my opinion, that where the possession in fact is all on one side, a forcible entry upon that possession, although made by the party having the best title, does not, *ipso facto*, divest the adverse possessor of his possession in fact, and convert it into the possession in fact of the person making the forcible entry. I regard such an entry as tortious, because it is prohibited by law. And I think no one can by a temporary tortious entry, such as Tribble made, divest the possessor in fact of his possession.

That Tribble's entry was forcible, and therefore tortious, under the statute of 1810, seems to me to be clear, if we give effect to the obvious meaning of the legislature as expressed in plain, intelligible language. Any entry, with or without multitude of people, against the will of the person possessed of the premises in fact, is declared to be forcible. Here Tribble entered with his hands, cart, and oxen, and against the will of Frame, who was, I think, possessed in fact; at least, the evidence which the court were required to instruct the jury to disregard tended to prove such a possession. Tribble was, therefore, guilty of the first wrong. He had no more right to enter with force upon the land possessed by Frame than if he had been a perfect stranger to the title. This point is settled in the case of *Smith &c. vs. Dedman*, IV Bibb, 192.

If, then, Tribble was a tortfeasor, was Frame bound to submit to his forcible conduct, or had he a right to repel force by force? The law gave Frame a remedy by writ of forcible entry, but was he bound to stand by and let Tribble forcibly remove the fences, and then take out his writ? I think he was not bound to stand by, but that he might lawfully repel the aggression by force.

In the case of *McIlvoy vs. Cockran*, II Marshall, 271, it is laid down that the possessor of the realty may justify a battery in repelling those who invade the possession by *actual force*. Where the entry is made without *actual force*, although it may be construed a *force in law*, then a request to depart is necessary before the possessor can lawfully lay hands on the person entering and turn him out. When such request is made and not obeyed, the possessor may seize the invader, and if he resists by violence, and assaults the possessor, he will be justified in using such force as may be necessary to accomplish the object; and however fatal the consequences, they are to be attributed to the original wrong doer. These doctrines are fully sustained by the case cited, and are, in my opinion, based upon sound reason and morality. They operate to secure the possessions of men, and tend to check the unbridled and wicked passions of those who multiply oppressions and trample upon the law. In this case, it is nowhere intimated, that if Cockran had the better title, that would have authorized him to remove the posts and rails mentioned in *McIlvoy's* plea, and thus subjected *McIlvoy* to damages for the assault and battery, without regard to the wounding, charged in the declaration.

In the case of *Bobb vs. Bosworth*, Litt. Sel. Ca. 81, it is held that no one can lawfully use violence and force in regaining the possession of a slave. "It is not material (says the court) whether *Bobb* or *Bosworth* had the better right to the negro."—The same doctrine is maintained in III Blackstone, 4, and III Inst. 134. Recaption must not be "in a riotous manner or attended with a breach of the peace." This doctrine is expressly applied by Blackstone, 3 vol. 5, to real property. "If individuals," says Blackstone, "were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature." The doctrine of self-redress, except in defence, and except where it can be done peaceably and without violence, is denounced in every book where I have seen the subject treated of; and the

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right to defend our persons, property, and possessions, against the lawless conduct of every illegal assailant, is as clearly maintained.

It may be said that the case of *Tribble vs. Frame*, in V Litt. 187, justifies the entry made by Tribble, and authorized him to remove the fences. There is no expression in that case, which sanctions the idea, that the holder of the better title has a right, either before or after judgment of eviction, to enter upon the possession of the occupant by force, and to the danger of the public peace. If the court, in that case, believed that the jury were authorized to infer from the evidence, that Tribble entered peaceably, and thereby became possessed, they might well, thereafter, look upon Frame as a wrong doer, and justify Tribble upon the principle of self-defence. But if that case intended to establish the doctrine that the owner of the better title has a right to enter forcibly upon the occupant, and that the occupant had no right to repel or resist such force, I acknowledge that I am unwilling to recognise it as an authority. If that case means that the owner of the better title, by barely going upon the land in a peaceable manner, although it be against the will of the occupant holding adversely, thereby divests the occupant of his actual possession and unites the possession in fact with the title—I am not prepared to follow it. Where will such a doctrine end? If it prevails, the holder of the better title may cross the fence of the occupant while his growing crop is upon the land, consider the title and possession as united in himself, and then throw down and remove fences, exposing the crop to destruction with impunity. If it prevails, the owner of the better title may slip into the house of the occupant in the disguise of a visiting friend, and being in *peaceably*, may regard the title and possession as united in himself, and then order the family to depart, and if they refuse, may turn them and throw their property into the street. Such a doctrine can eventuate in nothing short of quarrels, fights, and bloodshed. The statute of 1810 was framed to prevent these mischiefs, and in order to do it effectually, it declared that any entry against the will of the person possessed of the

premises in fact, should be deemed forcible; and consequently, under my view of the law, the possessor may resist this force by force. If the owner of the better title enters under the disguise of peace and quiet, and thereafter begins to use actual force, by beating the tenant to make him depart, or by throwing his goods out of doors, such conduct displays the *quo animo*, with which he slipped in, and therefore, it should relate to the time of his first entry. It was wisely provided in the statute that any entry against the will of the tenant should be a tort. The whole object of the statute will be entirely defeated, if the doctrine be established that a mere entry remits the proprietor of the better title to all the rights which he had by the common law; for he must be a poor contriver who could not, at some time, find means of entering in an apparently peaceable manner.

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It may be insisted, and it was urged in argument, that the opinion which I entertain would subvert the action of ejectment, and take away the right of entry. Not so. The questions here discussed have not the least bearing to deprive the rightful owner of land of his action of ejectment or of his right of entry. The statute relative to forcible entries, declaring what shall be a forcible entry, and prohibiting the exercise of the right of entry by force, does not pretend to say, that the right of entry shall not continue to exist. The right of entry continues, and is not tolled by declaring that it shall not be forcibly exercised. The right of entry remains, but it is regulated in such manner as is required by the peace and good order of society. The right owner must appeal to the law, and ask its aid to enforce his right of entry, instead of taking justice in his own hands as he might have done at common law. If the tenant consents to the entry on the part of the true owner, by entering, his title becomes complete, by uniting the possession and title. But if the tenant will not consent, the true owner must resort to his action to enforce his right of entry, and not break the peace. Unless, therefore, regulating the right amounts to a destruction of it, the action of ejectment, which depends upon a right of entry, is not

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destroyed. It might be said, with as much propriety, that regulating commerce, and prescribing the terms upon which foreign goods are to be introduced, utterly destroyed commerce and excluded all foreign goods. The argument is this, because the right to use force is taken away, the right of entry is thereby destroyed. *Non sequitur.*

It may be said, that Frame could not maintain an action of trespass, *quare clausum frigit*, against Tribble for forcibly entering upon the land, and destroying the fences. Admit that Tribble might defend himself in such an action by the plea of *liberum tenementum*, will that show, that Frame cannot recover in an action of assault and battery, for an injury to his person, or in an action upon the case for the injury which his growing crop may sustain in consequence of Tribble's forcible entry and illegal removal of the fences? Certainly not. The trespass on land, for which the remedy is given by action of trespass, *quare clausum frigit*, is, according to Blackstone, "an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property." The damages allowed are for the injury the owner sustains in the deterioration of the realty, by the trespass. If the defendant can show that the freehold is his, the loss falls upon him, and no one else has a right to complain. And if they do, it is but a false clamor. Hence the plea of *liberum tenementum* is always a good defence to an action of trespass *quare clausum frigit*. But because the rightful owner cannot be made to pay for damage which he does to his own estate, does it follow that he can destroy his own estate, pull down fences and houses, and thereby involve the persons and property of his neighbors, without being responsible for the injuries done to them by such conduct? Most clearly not. If a man sets fire to his own house, and thereby consumes mine, I cannot make him pay me the value of his house, but it is well settled that he is bound to pay for mine. There is not a wiser or sounder maxim in the law, than that which requires us to use our own so as not to hurt another. In this case the law prohibited Tribble from using his land until he had paid Frame for

his improvements. It likewise prohibited him from entering upon his own land with force, to the disturbance of Frame's possession. He refused to be governed by the law and, in violation of its injunctions, he has committed a battery on Frame, for which I think he ought to be subjected to damages.

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If Tribble had, by force, driven Frame from the land, I suppose it will be conceded that Frame, by his writ of forcible entry and detainer, could have recovered the possession again. Imagine such a case, and after possession is restored, Tribble again drives him, by force, and so on as often as the possession is regained, must Frame submit to such repetitions of violence? His recovery of possession is a mockery, if it does no more than place him in a situation to invite a new attack. My idea is, that he may resist expulsion by force, provided he be a *bona fide* possessor. But I would not extend to him such right of resistance in case he was a fraudulent possessor. In this respect, I coincide with the opinions expressed by Judge Mills, in his dissent delivered in the case of Chiles &c. vs. Stephens. To illustrate my meaning by putting a case. If a man, having been two years in possession, close his doors and leave home for a day, and find a disseizor in possession upon his return, and he enter upon the disseizor and put him out by force, I would not apply the provisions of the act relative to forcible entries and detainers, in favor of the disseizor. I would discountenance him on account of his fraud, and for the same reason I would deny to him the right of defending a possession which he had acquired in violation of law, and to which the law did not extend protection, by exempting the possessor from the remedy by forcible entry and detainer. All my ideas on the subject are based upon a deep conviction of the impropriety and unlawfulness of permitting a man to acquire a right which the law will respect and sanction, while he is acting in violation of what the law requires of him. Here the law denounces Tribble's entry upon the land by force. He does enter with force, and by that act is made to acquire a right, to inflict a personal injury upon Frame, if

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VS.  
FRAME.

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he will not abandon a possession which the laws secure to him.

It is my opinion that the judgment should be affirmed, with costs and damages.

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TRESPASS.

### S. Tribble, Sr. vs. W. Frame.

Case 177.

Error to the Montgomery Circuit; ROBBINS Judge.

*Trespas, action of.*

October 24. Chief Justice ROBERTSON delivered the opinion of the court.

See case.

SAMUEL TRIBBLE, Sr. sued Win. Frame, Sr. in trespass *quare clausum frigit*, for the entry described in the case of Tribble et al. vs. B. Frame, just decided. The case was once before in this court. See VII Mon. 529.

After it was remanded, new assignments were made, and the parties pleaded until they concluded on the single point of possession in fact, at the time of the alleged trespass. Tribble averring that he was in the actual possession, and Frame traversing that averment. However irregular the pleading or informal its issue may be, the issue was material. And, therefore, if the facts, (the same as those detailed in Tribble et al. vs. B. Frame, supra) had justified the verdict and judgment obtained by the defendant, Tribble would have no just cause for complaining. But, as already decided, the proof did not, in our opinion, authorize the deduction that Tribble was not in the actual and exclusive possession when Frame made the entry for which this suit was brought.

Wherefore, the judgment must be reversed, and the cause remanded for a new trial.

Monroe and Huggin, for plaintiffs; Hanson, for defendant.

**S. Tribble and Son vs. W. Frame. TRESPASS.**

Error to the Montgomery Circuit; ROBBINS, Judge. Case 178.

*Trespass. Forcible entry. Justification.*

Chief Justice ROBERTSON, delivered the opinion of the Court. October 24.

THIS is an action of trespass *quare clausum fregit*, and assault and battery, instituted by William Frame against Samuel Tribble and sons, for an entry on land, and a battery committed in the affray described in the case of B. Frame vs. S. Tribble et al. just decided. The case was tried upon an issue on a plea amounting *only to liberum tenementum*. The circuit court instructed the jury that, according to the facts, Samuel Tribble, Sr. had no right to enter on the land. On a writ of error to this court, that instruction was declared to be erroneous. This court decided that Tribble "*had a perfect right to enter,*" and referred to the case in V Littell, 187.

But this court also said, in that case, that Tribble's right of entry, though a full justification in an action of trespass *quare clausum fregit* merely, did not, *per se*, justify a battery on the person of Frame. See III Mon. 13.

On the return of the case from this court to the circuit court, Samuel Tribble, Sr. pleaded that the freehold was in him; that he had entered on the *locus in quo*, and was in the actual possession thereof; that the defendant in error afterwards entered and attempted, *by force*, to expel him; and that, *thereupon*, he used the force (complained of) *in defence of himself and his possession*. The suit was abated as to one of the sons, and the other pleaded that he entered with his father and acted with him, and by his command. Upon issues formed on these pleas, the jury found a verdict for the defendant in error for \$14 in damages, for which the court, after overruling a motion for a new trial, rendered judgment.

The pleas contain a legal defence to the whole action. If, as averred, S. Tribble was in the actual possession of his own land, Frame's entry was tortious; and if force was used for the purpose of expelling Tribble or of disturbing his possession, he had a legal right to repel force with force, and his

When a person is in the actual possession of his own land, he has a right to expel, with force, any

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ET AL.

*forcible disturbance thereof.*

And his son, acting under his authority, is equally justifiable.

son, acting under his authority, was equally justifiable.

For the reasons stated in the case of *S. Tribble et al. vs. B. Frame*, we are of the opinion that the circuit court erred in overruling the motion for a new trial.

We are also of the opinion, that the circuit court erred in instructing the jury, as it did on the motion of the defendant in error, that, although *S. Tribble, Sr.* had a legal right to enter on the land, nevertheless, if "*in entering*," the plaintiffs in error assaulted the defendant, such personal assault was not justified by the right of entry. Without intimating whether *S. Tribble* would have been justifiable for applying force to the person of the defendant in the act of entering, and to overcome a forcible resistance to his entry, we are satisfied that the instruction was abstract, and, therefore, erroneously given, whether the abstract proposition be true or false. There was no fact tending to prove that any actual force was used in the act of entering on the land, or that the battery complained of was committed "*in entering*." On the contrary, the proof shows that the force was employed whilst *S. Tribble* was in actual possession, and in the necessary defence of that possession.

Wherefore, the judgment of the circuit court must be reversed, and the cause remanded for a new trial.

*Monroe and Haggin*, for plaintiffs; *Hanson*, for defendant.

TRESPASS.

Case 179.

*S. Tribble, Sr. vs. W. Frame et al.*

Error to the Clarke Circuit; CLARKE, Judge.

*Trespass, action of.*

October 24.

Chief Justice ROBERTSON delivered the Opinion of the Court

See case.

THIS is an action of assault and battery, instituted by Samuel Tribble, Sr. for a battery by William Frame, Jr. and others, in the same affray described in *Tribble et al. vs. Frame*, (*supra*.) Upon issues like those made up in that case, the jury,

in this case, found a verdict for the defendants, and judgment was rendered accordingly, after a motion for a new trial had been overruled. GORDON  
vs.  
PHELPS.

For the reasons given in the case referred to, we are of the opinion that the defendants were wrongful assailants, according to legal deductions from the facts as we are disposed to think they ought to have been considered by the jury. And, therefore, we think the plaintiff was entitled to a new trial.

Wherefore, the judgment is reversed, and the cause remanded for a new trial.

*Monroe and Haggin*, for plaintiffs; *Hanson*, for defendants.

## Gordon vs. Phelps.

DEBT.

Appeal from the Trigg Circuit; SHACKLEFORD, Judge.

Case 180.

*Interest. Pendency of another suit for same cause of action, plea of. Pleas in abatement. Demurrer.*

Judge NICHOLAS delivered the opinion of the court.

October 24.

PHELPS sued Gordon, in debt, upon a note executed and payable in New Orleans, stipulating for the payment of interest, after maturity, at the rate of eight per cent. per annum.

On a note executed and payable in N. Orleans, stipulating for the payment of eight per cent. interest, and there be no evidence in the cause showing what the rate of interest is in N. Orleans, a judgment for principal and eight per cent. interest to time of the judgment, is proper.

The court rendered judgment, by default, for principal and accruing interest till paid at the rate of eight per cent., and Gordon appeals.

Whatever might be the effect of a stipulation for such a rate of interest on the face of a note executed in this state, there is no pretence for giving any vitiating effect to it when executed, as this was; in another state, whose laws on that subject are not made known to us by appropriate pleading. The defendant was properly chargeable with interest, according to his agreement, up to the time of rendering the judgment, but there it should have stopped. *Pawling vs. Sartain*, IV J. J. Marshall, 238.

Previous to rendering the judgment, Gordon had filed two pleas in abatement, which were afterwards, on the motion of the plaintiff, rejected. The only

But judgment charging obligor with \$



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ET AL.  
VS  
EVERAGE &C.**

percent, interest from the rendition of judgment till payment, is improper.

Where appellate court has ordered a suit for the same cause of action, to be dismissed absolutely, it is a final disposition of that suit, and it is not necessary the plaintiff therein to wait until the order is entered in the circuit court before he commences another suit.

one of these pleas that has any pretensions to sufficiency, says that in a former suit for the same cause the plaintiff obtained judgment against the defendant, which judgment was afterwards reversed in this court, and the cause remanded for further proceedings in the circuit court, and that it was not dismissed in that court until after instituting this suit.

Without determining whether it was necessary for the plea to aver that the former suit was still pending at the time of filing the plea, we think it was bad on another ground. It should have shewn the character of the proceedings directed by the reversing order of this court. If that order had been to dismiss the suit absolutely, or any thing equivalent thereto, it was a substantial final disposition of that suit, and it was not necessary for the plaintiff to wait until it was entered in the circuit court before he commenced this suit. The plea should have so described the reversing order as to have shewn that it was not of that character.

The pleas being bad, we think the court did right in disregarding them without requiring a demurrer.

Judgment reversed, with costs, and cause remanded, with directions to enter judgment pursuant hereto.

*Morehead and Brown*, for appellant; *Crittenden*, for appellee.

**CHANCERY.**

**Murden et al. vs. Everage &c.**

**Case 181.**

Error to the Simpson Circuit; **GRAHAM**, Judge.

*Slaves. Husband and wife. Choses in action of wife.*

October 24. Judge **NICHOLAS** delivered the opinion of the court.

Under will of record in Virginia, wife is entitled to a share of slaves, which remain in Virginia with the ex-

**THE** wife of Everage, previous to marriage, was entitled, as legatee of her grandfather, to a share of four slaves. The grandfather resided and died in Virginia, where the slaves remained in the possession of the executor until some time after the death of Mrs Everage, when they were delivered by the executor to two of her co-legatees,

and by them brought to this state. This suit in chancery was brought by Everage to obtain partition of the slaves.

The only question presented for consideration is, whether he can maintain the suit in his own name, and if it should not have been brought by the administrator of his wife.

We think it can only be maintained by the administrator. Marriage is only a qualified gift to the husband of the wife's *choses* in action,—that is, upon condition that he reduce them to possession during its continuance. If he die without having reduced them to possession, they survive to his wife, and do not pass to his personal representative. So, on the other hand, if she die before him, they do not survive to him, but pass to her administrator. Crozier vs. Gano, IV Bibb, 175.

**BRONAUGH vs. BRONAUGH.**  
 executor until after the death of the wife, decided that, it not appearing to the court that there is any law in Virginia similar to the statute of this state which would make the slaves pass directly to the legatees or otherwise than as *personalty*, therefore the husband cannot, after death of his wife, maintain a suit, in his own name, to recover his wife's share of the slaves.

Legacies or bequests of personal property are literally and strictly *choses* in action, within the meaning and operation of this rule. See I Roper on Property, 201. Whether general or specific, they transfer only an inchoate property to the legatee. To render the right absolute and perfect, the assent of the executor is indispensable. Toller on Executors, 306.

We know judicially of no law of Virginia, similar to the statute of this state, which would make the slaves pass by the will directly to the legatees, or otherwise than as *personalty*.

Decree reversed, with costs, and cause remanded, with directions to dismiss the bill.

Crittenden, for plaintiffs; Monroe, for defendant.

## Sarah Bronaugh vs. Wm. Bronaugh. MOTION.

Error to the Jessamine County Court.

Case 182.

*Executor. Security. Administration cum testamento annexo, grant of.*

Chief Justice ROBERTSON delivered the Opinion of the Court. October 25.

GEORGE BRONAUGH, deceased, nominated his surviving widow executrix of his last will, and therein requested that she should be permitted to

Although the will direct that executor be not required to give security, the county court may, if it suspect the executor of or fraud or apprehend that the assets will be insufficient for payment of testator's debts, require him to give security; and if executor refuse, or, on reasonable time allowed him, fail to

**This writ of error is prosecuted, by the widow of the testator, to set aside the foregoing orders.**

The county court had not an arbitrary and unlimited power to require security contrary to the testator's will. Unless the court had suspected, from their own knowledge, or from the suggestions of others who were interested, that the executrix was disposed to act fraudulently, or that the assets would be insufficient to pay all the testator's debts, it had no legal right to require her to give security. See 21st section of an act of 1797, 1 Dig. 526. The record does not intimate that the court had any cause for any such suspicion, or that the motion of the executrix was overruled for any other reason than merely because William Bronaugh opposed it.

The record does not shew that the executrix was "required" to give security and either "refused" or (within reasonable time allowed her) "failed;" nor that William Bronaugh was appointed administrator *cum testamento*, because she did fail or refuse, after having been so required, to give security. This court cannot, therefore, decide that the grant of administration was proper and according to law.—Wherefore, the order of the county court must be reversed.

If the county court shall suspect the executrix of fraud, or apprehend that the assets will be insufficient for payment of the testator's debts, she should be "*required*" to give security; and if she shall refuse, or shall, within a reasonable time, *fail* to do so, the court, upon making those facts appear on its record, may grant administration with the will annex-

ed. What would be reasonable time, must depend on circumstances. Perhaps a day or even an hour may be deemed reasonable time, unless the contrary shall be made to appear from facts exhibited on the record.

Unless the county court shall apprehend fraud or a deficit of assets, the plaintiff in error should be permitted to qualify, as executrix, without giving security.

The plaintiff in error must have a judgment for costs against the defendant.

*Owsley and Hewitt*, for plaintiff; *Chinn*, for defendant.

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ET AL.  
VS  
BRADFORD'S  
ADMIN'RS.

give security,  
the court  
may, upon  
making these  
facts appear  
upon its rec-  
ord, grant ad-  
ministration  
cum testa-  
mento an-  
nexo.

## Anderson et al. vs. Bradford's Administrator. MOTION.

Error to the Bracken County Court.

Case 183.

*County levy, collector of. Motion.*

Chief Justice ROBERTSON delivered the Opinion of the Court.

October 25.

THE defendant in error, as administrator of Bradford, who had been sheriff of Bracken county, obtained a judgment, upon motion in the county court of said county, against the plaintiffs, as the sureties of Reed, who had been Bradford's deputy, for \$64 6 cents, as "the balance due Martin Marshall," upon sums levied for him in 1825-6.

On a motion by sheriff against his deputy, or the sureties of his deputy, for a failure to collect, pay, or account for county levy, there should be proof that there was a levy laid, and that the clerk delivered to the deputy a list of the persons chargeable therewith, and also that the deputy collected, or undertook, or was bound to

That judgment must be reversed, for two reasons.

1st. The proof was insufficient. There was no proof that a levy was laid for 1825 or 1826, or that the clerk had delivered to Reed a list of the persons chargeable therewith. It does not appear that Reed collected, or undertook, or was bound to collect, the levy for either of those years; consequently, the liability of the plaintiffs was not shown.

2nd. The county court had no jurisdiction. The 21st section of an act of 1799, II Dig. 1140, authorizes a *sheriff* to move, in the quarter session court, against his deputy and his sureties, for a failure to

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VS.  
CARLILE.

collect the  
levy.  
County court  
has jurisdiction of a  
motion made  
by a sheriff  
against his  
deputy, or  
the sureties  
of his deputy,  
for a failure  
to collect, or  
pay, or ac-  
count for  
county levy.  
But county  
court has ju-  
risdiction of  
a motion  
made by a  
collector of  
the county  
levy, (who  
has been ap-  
pointed by  
itself,) a-  
gainst his de-  
puty and the  
sureties of his  
deputy, for a  
failure to col-  
lect or ac-  
count for  
county levy.

collect, or pay, or account for "taxes" collected by him, or which he was bound to collect.

The 4th section of an act of 1797, II Dig. 854, authorizes the county courts to appoint "collectors" of the county levy, and authorizes motions against them in the county courts; and the 5th section of the same act authorizes "each collector, appointed as aforesaid," to move against his deputy collector, and his sureties, in the county court, for any delinquency by the deputy, in failing to collect or account for the levy which it may have been his duty to collect and account for.

The act of 1797 applies only to "collectors" appointed by the county courts. It does not embrace sheriffs who are *ex officio* collectors of the levy, when "collectors" shall not have been appointed.

The subsequent act of 1799, provided a remedy for sheriffs against their deputies, by motion in the courts of Quarter Sessions, whose jurisdiction has been transferred to the circuit courts. For "taxes," according to a reasonable interpretation, should be deemed to include "levies."

Wherefore, as we know of no statute authorizing such a motion as this, by a sheriff against his deputy or his sureties, in a county court, we conclude that the county court of Bracken had no jurisdiction in this case.

Judgment reversed, with costs.

Crittenden, for plaintiffs.

MOTION.

## Carlile vs. Carlile.

Case 184.

Error to the Campbell Circuit; BROWN, Judge.

*Sales of land, quashal of. Motion to quash sale of land, limitation of.*

October 26.

Chief Justice R. BERTSON delivered the opinion of the Court.

UNDER a *fieri facias* issued in favor of Robert Carlile against John Carlile, for about \$1325, a tract of land, containing nearly 1000 acres and valued at \$25 an acre, was sold by the sheriff of

Campbell county, and was purchased by the said John Carlile, "for the amount of the execution." CARLILE  
VS.  
CARLILE.

In November, 1830, the circuit court, at the instance of John Carlile, and upon a notice served on Robert Carlile, quashed the sale of the land, because the court was of the opinion that the whole tract had been sold for about \$1330, which exceeded the whole amount actually due on the execution.

This writ of error is prosecuted to reverse the order quashing the sale.

It appears that as much as \$1330 was not due on the execution at the time of the sale; and it also appeared, (from the testimony of the sheriff who sold the land, and of Wm. K. Wall, who bought it as the plaintiff's agent,) that, from a calculation made by them, immediately before the sale, they supposed that the whole amount due upon the execution was, at that time, at least \$1330, and that the sheriff, when he commenced the sale, announced that sum as the amount of the execution. And, consequently, the proof was sufficient to show that the land was sold for \$1330; when, in fact, the true amount of the execution did not equal that sum. And therefore, as a less quantity than the entire tract might have been sufficient to satisfy the execution, the sale was illegal.

The circuit court, supposing that the testimony of Wall and the sheriff was irrelevant, excluded it. But, although the order quashing the sale could not be sustained without that evidence, nevertheless, as we are clearly of the opinion that the excluded testimony was legal, we shall not disturb the order of the circuit court, unless, as the plaintiff's counsel contends, the motion was barred by time.

We know of no statute limiting this motion to one year succeeding the sale.

The statute of 1811, I Dig. 516, does not apply to such a case as this. That statute prescribes a limitation of one year to motions to quash sales of land under execution for three causes only; that is, for *fraud* in the sale, or for a failure to sell "on some notorious and public part" of the tract, or for sel-

Where sheriff on the sale of a tract of land, announced to the bidders that a greater amount was due in virtue of the execution than really was due by it, and the land is sold "for the amount of the execution," the sale will be quashed. One year is not a bar to a motion to

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ET AL.  
VS.  
AMBLER.

quash such a  
sale.  
Statute of  
1811, limit-  
ing motions  
to quash sales  
of land, does  
not embrace  
a motion to  
quash a sale  
of land for  
such a cause  
as is made out  
in this case.

ling either before 11 o'clock, A. M. or after 3 o'clock, P. M. Fraud is not imputed in this case; nor is there any objection to the time or place of sale. There may be other causes than any of those mentioned in the act of 1811, which may be sufficient to authorize the quashal of sales of land; and to motions for quashal for any of those other causes, the statute cannot be applied. Such motions should be made in reasonable time; and perhaps there may be analogies which might designate a certain limitation to them. But, in any event, they are not limited to one year. Therefore, the motion in this case was not barred by lapse of time.

If (as supposed by the plaintiff's counsel) the circuit court had quashed the levy and sheriff's return, as well as the sale, there would have been error. But the order itself, as exhibited in the record, shows that the sale alone was quashed.

Wherefore, perceiving no error in the order of the circuit court, it is affirmed with costs.

*Wickliffe and Wooley*, for plaintiff; *Haggin, Morehead and Brown*, for defendant.

TRAVERSE.

## Kercheval et al. vs. Ambler.

Case 185.

Error to the Mason Circuit; ROPER, Judge.

*Forcible entry and detainer. Judgment in ejectment.  
Disseizor and disseizee. Pedis possessio.*

October 29.

Chief Justice ROBERTSON delivered the opinion of the Court.

JOHN KERCHEVAL and Franklin Kercheval prosecute this appeal to reverse a judgment of restitution obtained against them, by the appellee, on a traverse to an inquisition on a warrant for forcible entry and detainer.

Forman's heirs having obtained a judgment in ejectment against John Kercheval and others, and having evicted them by a *habere facias*, leased the same land to Franklin Kercheval, one of the appellants, who, together with the other appellant, continued to reside upon and occupy it. Afterwards, during their occupancy under the said lease, the

sheriff, acting in obedience to a *habere facias* issued on a judgment of ejectment, which had been obtained by the appellee against the appellant, John Kercheval. (at the same term at which the judgment was obtained by Forman's heirs,) for a part of the land which had been leased to Franklin Kercheval, but not including the dwelling house, entered with an agent of the appellee on a field with growing corn upon it, (neither of the appellants being present) and delivered possession thereof to the agent, and returned the writ, "*executed.*"

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ET AL.  
VS.  
AMBLER.

Neither the appellee, nor any other person for him, remained on the field, or ever afterwards made an actual entry upon it. The appellant, Franklin, having gathered the corn and cultivated the field the next year, the appellee proceeded against the appellants, by warrant of forcible entry and detainer, to obtain restitution. The circuit court, upon a traverse to that court, instructed the jury, in effect, that if the appellants, or either of them, had entered upon or detained the field against the will of the appellee after the execution of his *habere facias*, he or they, so entering or detaining, was guilty of a forcible entry or detainer.

That instruction contains the most material of the various points presented by the assignment of errors :—

There was no actual eviction by the *formal* delivery of possession to the appellee's agent ; and as Franklin Kercheval was not a party to the judgment or the writ, he was not concluded by the sheriff's return. The delivery by the sheriff gave to the appellee no other right or possession than his own entry, under his judgment, would have given. If Franklin Kercheval had been *actually* evicted, and the appellee or his agent had remained on the land, restitution might have been obtained by him upon a warrant of forcible entry and detainer, unless there had been such a privity between the appellants as to have authorized the eviction of both of them by the *habere facias* ; and whether there was such a privity or not was a question which the jury, and not the court, should have decided. The

Person who is not a party to a judgment in ejectment, is not concluded by the sheriff's return of *habere facias* thereon.

When two persons occupy the same land, whether there is such a privity between them as to authorize the eviction of both



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ET AL.  
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AMBLER.

of them under a *habere facias* against one of them, should be left to the jury to determine, and should not be decided by the ct.

Judgment in ejectment gives plaintiff therein no right of entry on land in the possession of a person who is neither party nor privy to the judgment.

If, in the absence of the person who is in actual possession of land and no party or privy to the judgment in ejectment, the sheriff, under a *habere facias* puts the pliff. in the judgment in possession, but neither the plaintiff, nor any other person for him, remain a possession, and no person, who held the actual possession at the execution of

appellee or his agent may have had a right of entry against John Kercheval in consequence of the judgment against him, and such an entry might have been sufficient to authorize a judgment of restitution as to him if he afterwards entered and detained the field. So, too, if Franklin Kercheval, even though he had been neither party nor privy, had been *actually* evicted, and had entered afterwards upon the appellee, or any other person upon the land holding the actual possession for him, he might have been compelled to make restitution according to the doctrine settled in the case of *Chiles vs. Stephens*, 111 Mal. 340.

But he was not actually evicted; nor did any person remain upon land detaining the possession for the appellee. The possession of the appellee was, therefore, constructive only, and cannot be construed as more extensive or effectual than he had a right to claim it to be under his judgment and writ. As against Franklin Kercheval (unless he was a privy) the judgment in ejectment (for ought that appears in this record) gave to the appellee no right of entry; and, therefore, as Franklin was not in fact turned out of possession, and as the agent did not remain on the land, the appellee cannot be deemed to have been in the actual possession, as between him and Franklin, when the latter afterwards rightfully entered to occupy and cultivate the field. He was not affected by the execution of the writ, and could not have been, unless the agent of the appellee, or some other person for him, had remained upon the ground, whereby there would have been an actual ouster and detainer, which might have rendered a warrant for restitution necessary. If the appellee had no right to enter on the possession of Franklin Kercheval, surely the latter was not guilty of a forcible entry or detainer in entering upon and using the field after the agent had departed. There could be no constructive possession in such a case as against a person who had been and continued to be possessed in fact, and was not liable to eviction by the *habere facias*. As to him the entry of the agent and the sheriff was tortious, and the instant they left the ground, he had a perfect legal right to

use and retain the actual possession of the field ; and the appellee could have had no right to restitution ; because, as the entry by his agent was a tortious intrusion on Franklin Kercheval, when the agent left the ground, Franklin had a lawful right, *co instanti*, to use and retain it just as if there had been no such unauthorized entry, as between disseizor and disseizee the law will not construe the actual possession of the former to be more extensive or protracted than his *peais possessio*. And therefore, if A, without a right of entry, shall intrude on the actual possession of B, and then depart, such a transcient and illegal occupancy would not be sufficient to maintain a warrant for restitution against B for continuing on the land, as if there had been no intrusion on his possession.

Wherefore, we are of the opinion that the circuit court erred in giving the instruction which we have been considering.

There should be no judgment of restitution against Franklin Kercheval, unless a jury shall ascertain that there was a privity between him and John, and that the possession of the one was that of the other. The appellee cannot have restitution of that of which he has not been deprived.

We perceive no other error.

Judgment reversed, and cause remanded for a new trial.

*Morehead and Brown*, for appellants ; *Monroe and Beaty*, for the appellee.

## Outen vs. Graves, and

## Graves vs. Outen.

Error to the Jessamine Circuit ; KELLY, Judge.

*Usury. Note tainted with usury is void.*

Judge UNDERWOOD delivered the opinion of the Court.

OUTEN filed his bill against William W. Graves and John Graves, alleging that he purchased from John a note on William for \$868, bear-

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vs.  
GRAVES,  
and  
GRAVES  
vs.  
OUTEN.

*ut habere facias, retineas, and continues to occupy the land, he is not guilty of a forcible entry or detainer.*

Such proceeding is not an *actual* conviction of the person who is in actual possession.

CHANCERY.

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October 29.

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 vs.  
 GRAVES,  
 and  
 GRAVES  
 vs.  
 OUTEN.

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ing date the 8th of October, 1817, payable one year thereafter, negotiable in the United States Branch Bank in Lexington, signed by said William, and endorsed by said John ; that about the time the note became due, W. W. Graves applied for indulgence, which Outen agreed to give, provided a new note was executed, and John Graves would become bound for the amount thereof as a joint obligor ; that the endorsed note was left with — Headington for renewal, and that W. W. Graves, taking advantage of the failure of Headington's eye sight, fraudulently imposed upon him a new note signed by himself alone and took up the old note endorsed by John Graves. The new note was sent by Headington to Outen, who, discovering that John Graves had not signed it, went to see Wm. W. and John Graves on the subject. Outen charges, that Wm. W. Graves promised to go the ensuing morning to John Graves and to get him to become the surety in the new note, which he took back from Outen, and that said William said that he had destroyed the old note, and could not return it to Outen as he requested. Outen concludes his bill by alleging, that the Graves refused to give a new note, and that Wm. W. Graves was insolvent : wherefore, he prayed a decree against them for the amount of the first note &c.

Wm. W. and John Graves both deny that there was a sale of the note by John to Outen. They insist that the transaction was usurious, and John Graves resists a liability to Outen on that ground. Wm. W. Graves, in his answer, says that Outen loaned him \$700 only, and took the note for \$868, endorsed by John Graves, to secure the sum loaned, including therein usurious interest at the rate of two per cent. per month. Wm. W. Graves exhibits the note endorsed by John Graves, and avers, that he paid it off in the hands of Headington.

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We are fully satisfied, upon an examination of the record, that the transaction was an usurious loan of money, by Outen, to Wm. W. Graves. The original note, having been executed prior to the passage of the act of 1819 concerning usury, was void. Consequently, John Graves, as well as Wm. W., were

both absolved from the payment of that note. We cannot look upon the deposition of Samuel Owens, filed for the purpose of proving that the money was paid to John Graves, and thereby to sustain the allegations of the bill which assert that it was a purchase of Wm. W. Graves' note from John, in any other light than that of a forgery. Samuel Owens proves that he never gave any such deposition. That its contents are false is abundantly shewn by other evidence, even if it had been genuine. As there is no proof that John Graves ever executed a new note for the demand since the passage of the act of 1819, it follows that the court correctly dismissed the complainant's bill so far as it related to John Graves.

The new note executed by Wm. W. Graves, according to the testimony of Headington, was executed before the passage of the act of 1819, and, being no more than a renewal of the old note, was also void on account of usury. We cannot, therefore, perceive any ground upon which the decree against Wm. W. Graves can be sustained. It is unnecessary to consider the question presented in respect to the payment of the note originally given, and which is exhibited in the answer of Wm. W. Graves. Nor is it important to determine, whether there be any sufficient evidence to establish the fact that Wm. W. Graves ever executed a new note. The usury vitiates the whole transaction, and interposes an insuperable barrier to the granting any relief. Upon a superficial examination of the record, when the application for a supersedeas was made, we were disposed to doubt whether the evidence was sufficient to justify the opinion, that the transaction was usurious, and, therefore, a supersedeas was awarded in favor of Outen, but those doubts have been removed upon investigation. It results that the circuit court erred in entering a decree against Wm. W. Graves.

Wherefore, the decree on the writ of error, prosecuted by Graves, must be reversed, and the cause remanded, with directions to dismiss the complainant's bill, with costs.

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to obtain for A the loan of a sum of money from C, and C loaned the money to A at an usurious rate of interest on the faith of the note, decided, that, it appearing that the transaction was an usurious loan of money by C, the note was void, and A and B absolved from all liability to C for the money loaned by him to A.

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There is no ground for reversal on Outen's writ of error. Graves must recover costs on both writs of error.

*Huggin, for Outen ; Chinn, for Graves.*

*The counsel for Outen filed the following petition for a re-hearing, which was granted:*

Petition for a  
re-hearing.

As regards so much of this controversy as depends upon the writ of error by Wm. W. Graves, it is respectfully suggested, that the writ having issued in August, returnable to the present term, it did not, agreeably to the practice of this court, regularly stand for hearing ; that the petitioner, apprised of this, and meeting with some obstacles in his attempts to gain counsel, particularly detailed in the affidavit filed, was not represented or heard, or had an opportunity to be heard.

As to the crime of forgery, of which he stands convicted by the opinion delivered, he declares the deposition of Samuel Owens, as filed, was regularly taken, and he believes that none would doubt, after an inspection of the testimonials attending it, none of which are contained in the present copy of the record. Indeed, the name of the witness, whose deposition was taken, by his adversary, is different. One being Owens and the other Owings. He does rely that when the two depositions shall come, upon process for that purpose, and compared, he will stand redeemed from this charge.

Touching the question who sold the note to the petitioner, he would beg leave to say, that it had not seemed to him to be very important. And his bill was written in accordance with the fact, whatever may be the proof, that the testimony upon which the adversary depends to negative this statement of the bill, is of the most questionable and loose character—such as that of Mr. Nash—a most imperfect detail of an impression of admissions &c. &c. Is it credible that a man of common sense, a man of business, after he had stated the fact in his bill, repeated upon solemn affirmation in his answer, taken testimony to prove it, should, by some accidental conversation to the kinsman of his adversary,

concede that the truth were otherwise, and that he had not only told a falsehood, but superadded the crime of perjury. See the case of Myers and Owsly, Hardin.

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Yet, as the opinion supposes, the counsel for the petitioner looks upon this as a very unimportant fact. The important enquiry relates to the usury. Concerning the law of this matter, the counsel would submit these reflections. The borrower presents the question in an answer in the nature of a cross bill, and upon it the cause is prepared on the subject of usury. And the act of assembly, authorizing such bill, certainly holds the borrower liable for the debt. It is not at the pleasure of the defendant to hold merely an answer or a bill of discovery, at his election, after it has been treated, and the cause prepared upon it as a cross bill. If his proof may equal the requisitions of those who try the fact, then he waives his bill; otherwise he will avail himself of it. In this case, the charge of usury is made by a cross bill, in the nature of a bill of discovery, and the borrower stands bound accordingly.

But as to the fact. The petitioner was called upon to answer—and he not only negatives in general terms, but sets forth the consideration in particular. Now I would say, that I believe that no witness has affirmed to the usury, or to circumstance in law conducing to prove it. R. Houton comes nearest, agreeably to my understanding of the proof. He speaks of a conversation in which Outen mentioned the loan. He is then asked as to the rate of interest, and answers that he does not recollect to have been told. The question is then propounded, “Do you or do you not believe that the money was loaned, agreeably to his conversation, at more than six per cent.?” Answer.—I rather think it was my “impression.” Before this court it need not, I trust, be deliberately argued, that the question was inadmissible; that the answer is no evidence, and that, in revising the errors of the circuit court, this tribunal will give no effect to questions and answers which, upon exception, should have been expunged.

Another witness says, that when he asked Outen what was the interest received, the latter answered,

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that was best known to himself, or that was not to be known. Now, may it be inferred that interest was received, and that it was unlawful, because Outen does not tell Mr. Gorham, who appears to have no concern with it, all about it. Outen had already gone too far in speaking of his accommodations to their neighbors; it occurred to him that it was a matter of some delicacy, and he stopped. He may have had many motives for silence on the subject. Indeed, prudence, without regard to the feelings of Mr. Graves, and others, to whom he lent, forbid it. If he never had conversed with Mr. Nash, or Mr. Gorham, perhaps it would not have occurred to them, at a future day, to recollect what was not said, or repeat impressions which were not justified, as he now says. No answer, in evasion of an important enquiry, should compromise the interest of any man. Many other motives, than a consciousness that the interest was too high, might be justly ascribed to Outen. Nay, I would not believe that any man at that day would have feared that Col. John Graves would have pleaded, or permitted to be pleaded, the statute against usury in avoidance of his engagement for so paltry a sum. I do not believe that Outen feared it.

Thus I believe I have recited all the proof. Is it sufficient to outweigh the answer—and to impose a forfeiture of so large a sum of money—or were not the former views taken of this subject more correct? Nay, as this tribunal has often said, were it not more fair to conclude, that as the affirmative in this respect is with the defendants, they should have made more clear their case, and not to have left so much of doubt upon it; and that, failing in this, the decree should be against them. A re-hearing is respectfully prayed.

JAMES HAGGIN.

*After a re-argument of the cause, Judge Underwood delivered the following opinion of the court :*

UPON a careful re-examination of the record in these cases, after re-argument, we cannot resist the conclusion that the transaction was usurious on the part of Outen. There is no proof of the

sale of the note by John Graves to him which can be relied on. The statements of the bill, and the statement of his answer to the cross bill upon this subject, are satisfactorily disproved, and we think it is clear, that it was an advance of the money to Wm. W. Graves. We shall not comment on the testimony or conduct of the parties.

The money having been loaned prior to the passage of the act of 1819, severe as it may be, Outen is not entitled to any relief.

Wherefore, the decree as to John Graves is affirmed, with costs, and the decree as to W. W. Graves is reversed, with costs, and the cause remanded, with directions to dismiss the bill.

## Frank's Heirs vs. Hickman's Heirs. MOTION.

Appeal from the Fayette Circuit; HICKEY, Judge. Case 187.

*Restitution. Ejectment. Habere facias. Record.*

Chief Justice ROBERTSON delivered the Opinion of the Court. November 1.

FRANK's heirs obtained a judgment in ejectment, in 1826, against James Hickman; that judgment was, in 1828, reversed by this court, because title had not been proved in *all* the lessors, and the demise and the judgment were joint in the names of all. The case having been remanded; for a new trial, the suit was abated by Hickman's death.

In October, 1830, the appellees, claiming to be the heirs of the said James Hickman, moved the circuit court for restitution, alleging that their ancestor had been evicted prior to the reversal of the judgment in ejectment. The circuit court ordered a writ of restitution to issue, and this appeal is prosecuted to reverse that order.

The record does not show that any *habere facias* had ever been issued on the judgment in ejectment, or that Hickman had ever been evicted, in fact, by a writ. The right of the appellees to restitution, cannot be ascertained by the record, but must depend (if it exists at all) on extraneous facts, *in pais*, subject to controversy.

Where a judgment in ejectment in favor of plaintiff, in the circuit court, has been reversed by this



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court, and the tenant appears to be out of possession, yet if the record does not show that any *habere facias* issued, or that he was evicted by a writ, the court should not, on motion, award him restitution.

In such a case, it is well settled that restitution should not be ordered upon a summary proceeding, by motion. *Crocket vs. Lashbrook*, 5 Mon.; *Norton vs. Sanders*, 11 J. J. Marsh.

Besides, as the ejectment abated by Hickman's death, a new ejectment might be necessary, if the appellants should be turned out by a writ of restitution; and then, although they had, on a former trial, proved that some of them at least had a right to recover, they might be barred by lapse of time.

In the exercise of a sound discretion, the circuit court should have forbore to interfere upon motion, and have left the parties to their ordinary legal remedies, whereby their rights may be properly tried, and finally concluded.

Order reversed.

Payne, for appellants; Chinn, for appellee.

DOWER.

Case 158.

### Taylor vs. Lusk.

Error to the Garrard County Court.

*Dower, assignment of. Slaves, assignment of dower in. Mansion-House.*

November 1. Judge UNDERWOOD delivered the opinion of the court.

JONATHAN TAYLOR made a will, devising the principal part of his estate to Lusk. He made a provision for his wife, the appellant, by allowing her to occupy the dwelling house for life, and requiring that she should have a maintenance out of the proceeds of the farm. If his wife thought proper to renounce the provisions made for her in the will, he directed that "all his estate, after the assignment of her dower, should vest immediately and absolutely in Lusk." The land and slaves, which might be assigned to the widow as her dower, were, after her death, in like manner to vest in said Lusk.

The widow, within the year, renounced the provisions made for her by the will. It seems that four persons, styling themselves "commissioners appointed by the Garrard county court, at their May term,

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1829, to allot Mrs. Nelly Taylor her dower, &c." **TAYLOR**  
made a report to said court, at the July term, 1829, **vs.**  
describing certain land and slaves which they had **Lusk.**  
assigned to the appellant, as her dower in the estate  
of Jonathan Taylor, deceased.

The appellant, by her counsel, moved to quash and set aside the report, "because she was excluded from the mansion-house, and for other manifest errors therein," but the court overruled the motion, and ordered the report to be recorded.

The legality of the proceedings of the county court are now questioned, and various errors are assigned. We shall notice such as we deem of importance.

It is insisted that the whole proceedings should be set aside, because it does not appear that the persons who made the report had ever been appointed to discharge that duty by the county court, and because, conceding that they had been so appointed, it does not appear that the order was made on the application of the widow, or any other person whose duty it was to apply for their appointment.

The order, appointing the commissioners, is not copied in the present record. We cannot, therefore, decide whether it exhibits, on its face, a conformity with the requirements of the law. Were it before us, and was found to be amenable to the objections taken in the case of Smith and ux. vs. Maxwell, III Litt. 471, we should pronounce the proceedings irregular, and reverse them. But situated as the record is, we regard the appellant as having sanctioned the appointment of the commissioners, and that no question can now be made touching the original order. The appellant's bill of exceptions admit that the commissioners were appointed at the May term, 1829. Her only reasons relied on for quashing the report were, the failure to allot to her the mansion-house, and "other errors apparent upon its face." The bill of exceptions makes no question as to the legality of the original order, and as it does not present us a copy, after acknowledging its existence, we shall take it to have been such as the law requires.

When the order appointing commissioners to assign dower does not appear in the record, but the bill of exceptions acknowledges that such an order was made, and does not question its legality, it will be taken to have been such an order as the law requires.

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That the mansion-house is not allotted to the widow is insufficient ground for quashing of report of commissioners, making an assignment of dower. If widow gets an equal third part, in value, of the land, it is all of the land which the law gives her, and she cannot complain, no matter where it may be laid off to her. Law gives her no preference over the heirs or devisees.

When the personal representative refuses to consent to an assignment of dower out of the slaves, the county court should not assign to the widow her dower in the slaves. In such case, her remedy is in chancery. When executor or administrator con-

We perceive no sufficient reason for quashing the report, because the mansion-house was not allotted to the widow. If she obtained an equal third part in value of the land, it is all the law gives, and she cannot complain, no matter where it is laid off to her. The law gives her no preference over the heirs or devisees.

It is said that the county court had no jurisdiction to assign the widow her dower in this case, because the estate passed to Lusk, as devisee. It is, moreover, contended that the county court could not assign the dower in slaves, because the interest of the widow in this kind of property is contingent, dependant upon how many are left after the payment of debts. *Williams vs. Williams*, 1 J. J. Marshall, 106; *Hawkins &c. vs. Page's heirs*, IV Mon. 136, and *Rintch vs. Cunningham*, IV Bibb, 462, are cited to sustain these positions. These cases do not support the argument. They prove that where the husband has alienated in his life time, or where he holds but an equity, (and consequently does not die seized) or where the right to dower is denied, the county courts are not competent, under the act of 1803, to settle the controversy and allot the dower. But they do not touch a case where the husband died seized, and where there is no dispute as to the widow's right. Such seems to be the present case.

The propriety of the county court proceeding under the act of 1803, 1 Dig. 446, to assign dower in slaves, when the personal representative refuses his assent, may well be questioned. Where the executor or administrator refuses, the widow's remedy is in chancery. There the questions can be fairly settled. If the rights of creditors will not thereby be prejudiced, the widow should be allowed dower in the slaves. This remedy is indicated by statute, II Dig. 1153. But if the executor or administrator consents to the assignment of dower in the slaves, there is then no question as to the widow's right, and we think county courts may lawfully appoint commissioners to make it, under the act of 1803. The terms of that act are broad enough to embrace the case, and no good reason for going into a court

of chancery can be assigned, when the right is admitted. This view is fortified by the 4th section of an act of 1811, II Dig. 837, placing slaves upon the same footing with land, in respect to its division amongst the heirs, by commissioners appointed by the county court, when the personal representative assents. We see no reason why such commissioners may not assign dower as well as divide amongst the heirs. We believe it has long been the practice, under these statutes, to appoint commissioners to assign dower in slaves, where the personal representative consents. In this case, Lusk is executor, and we know his assent from his resisting the reversal.

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sents to the assignment of dower in the slaves, the county court may cause the assignment to be made.

The remaining enquiry is, whether there be any errors manifest upon the face of the report, for which it ought to have been quashed. It is said there are two; 1st, the allowance of \$60 to make the widow's share of the slaves equal a full third, and, 2nd, the postponement of the enjoyment of her dower until the end of the year. Upon the first point it is argued, that if the widow cannot get her full share precisely in the allotment of slaves, it ought to be made up to her in allotting such a portion of the services and time of one or more of the slaves as will give her a third, and that she ought not to be compensated in money. We think it amounts substantially to the same thing. The services and time of a slave produce money, and can be purchased with money, and when any little deficiency in the share of a widow is made up in money, it is giving her that which commands the services of slaves, and constitutes a fair equivalent for what she cannot get in kind, because of the impossibility of making the allotment exactly equal, according to the requirements of the law. Where the widow gets money to make up any deficiency in her share, her dower estate may terminate before the hire of a slave assigned to her every other day, or every third day, month or year, under the principles contended for, would equal the amount of money received. In this case the widow might be said to get too much. If she lived a long time, and the hire of the slave assigned as above would overgo the money received, it might be said she did not

In assignment of dower in slaves, an allowance of a sum of money to the widow, to make her share of the slaves equal a full third, is not error.

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get enough. These inequalities are generally trifling, and if exact equality must be the inflexible rule, it would tend to prevent any allotment in severalty, and require that all the slaves should be held alternately, or hired out, and the proceeds divided; for if a division is made, casualty, sickness, or death may make the different lots flagrantly unequal the day after.

Besides, there are inconveniences resulting from the alternate use of a slave, which render it more beneficial to have the inequalities in lots made up in money. We do not look upon the assignment of dower as precisely analogous to the case of joint tenants, by purchase, owning a single slave, and who will not make partition by sale, and division of the money.

Husband died in April, and dower was assigned to widow in July ensuing, but the report of the commissioners making the assignment, postponed her in the enjoyment of her dower until end of the year, decided not to be error; because she is indemnified by her distributive share of the crop.

There is nothing in the objection that the widow's right to take possession of the dower property was postponed until the end of the year. The will bears date on the 1st of April, 1829. The widow renounced the provisions made for her in the will on the 2nd of May, 1829. The testator must have died between these dates, and from the time he died, the law required that the slaves should be kept to cultivate the crop, &c. until the end of the year. The widow is indemnified for all this in her distributable share of the crop. See 1 Dig. 531.

Upon consideration of all the points, the judgment of the county court is affirmed, with costs.

*Owsley and Turner*, for plaintiff; *Crittenden*, for defendant.

## McGill's Administrator vs. Burnett.

Case 189.

Error to the Bourbon Circuit; FRENCH, Judge.

*Contract to procure remission of a forfeiture is illegal.*

November 1. Judge UNDERWOOD delivered the opinion of the court.

THE plaintiffs intestate agreed to pay Burnett 100 dollars, in property, "in consideration of his services and labor to be performed in and

Contract to pay a person

about the management of a petition to the Governor, in case a certain forfeiture (described in the contract) was remitted by him." **BARLETT vs. LOUDON.**

The declaration, upon its face, fully sets out the agreement, and we are of opinion that the court, upon the demurrer to the pleas, should have given judgment against the declaration, because the contract is such that no recovery can be permitted upon it. The contract is in effect to pay the plaintiff for his management, whether fair or foul, in inducing the governor to remit a forfeiture. Such contracts tend to obstruct a correct administration of the government. He who labors for the reward promised, will be induced to use his influence for the money he is to obtain; when, as a patriot and a citizen, he should only act for the good of his country, and under an impartial sense of justice, tempered with mercy. We can readily imagine the dangers likely to result from the corrupt artifices of mercenary managers in procuring pardons and remissions.

for his services in the management of a petition to the Governor for remission of a forfeiture, provided he shall procure a remission of it, will not be enforced, because such contracts tend to obstruct a correct administration of the government.

Such contracts are denounced by most if not all the elementary writers on contracts as illegal and against public policy. We think the language of Lord Eldon, to be found in *II Comyns on Contracts*, 127, applicable to this case.

Wherefore, the judgment is reversed, with costs, and the cause remanded for judgment upon the demurrer against the declaration.

*Talbot and G. Davis*, for plaintiff; *Denny*, for defendant.

## **Bartlett vs. Loudon.**

CHANCERY.

Error to the Fayette Circuit; *HICKY*, Judge.

Case 190.

*Sale bonds. Injunction.*

Chief Justice *ROBERTSON* delivered the opinion of the Court.

November 2.

THE only question we shall consider in this case is, whether the plaintiff is entitled to a perpetuation of his injunction to an enforcement of his sale bond, in consequence of the fact that the defendant in the execution under which the land was

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sold (for which the bond was given) had no title to the land ?

It sufficiently appears, that Daniel Colman (the defendant in the execution) had conveyed the land to Aaron Colman prior to the date of the execution; and there is no proof tending to shew that the conveyance was inoperative or fraudulent. The legal title must, therefore, be deemed to have been in Aaron Colman, and not in Daniel, at the time of the levy and sale.

Collection of a sale bond given on the purchase, under execution, of a tract of land to which debt. in the execution had no title. will, if it appear that the sale was made at the instance of the plaintiff in the execution, be enjoined.

It also sufficiently appears, that the levy and sale were made at the instance of the defendant in error, who was the plaintiff in the execution.

In such a case, the purchaser, acting in good faith, as the plaintiff seems to have done, has an equitable right to withhold the consideration. The defendant in error is not without his remedy against his original debtor.

Wherefore, it is decreed and ordered, that the decree of the circuit court, dissolving the plaintiff's injunction and dismissing his bill, be reversed, and the cause remanded, with instructions to perpetuate the injunction.

Cowan, for plaintiff; Chinn, for defendant.

DEBT:

### Marr vs. Hanna.

Case 191.

Error to the Hickman Circuit; SHACKLEFORD, Judge.

*Writ of error. Privies. Nominal and beneficiary plaintiff.*

November 2. Judge UNDERWOOD delivered the opinion of the court.

IN October, 1829, D. Drieblebiss instituted an action of debt, in the Hickman circuit court, against Hanna for the sum of \$1454 84 cents. At the April term, 1830, the defendant, Hanna, produced to the court an instrument of writing, bearing date the 18th of January, 1830, in which it is acknowledged by Drieblebiss that he had received payment in full from Hanna, and requesting that the court would dismiss the suit. Having proved the execution of this instrument by the subscribing wit-

noss, Hanna thereupon moved the court to dismiss the suit. Marr, the plaintiff in error, appeared and opposed the dismissal. He exhibited and proved the execution of an instrument of writing by Drieblebiss, bearing date the 2nd of January, 1830, by which the benefit of the suit was transferred to him. He also proved, that Hanna acknowledged, in the preceding fall, that the money which he owed Drieblebiss was going to Marr. It appeared in proof, that Drieblebiss owed Marr a sum about equal to that which Hanna owed him. Upon the foregoing evidence, the circuit court dismissed the action. Marr filed exceptions, and now prosecutes this writ of error.

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The first question for consideration is—can Marr maintain a writ of error in his own name? It is laid down as the general rule, in Tidd's Practice, Title, Error, 1189, "that no person can bring a writ of error to reverse a judgment, who was not party or privy to the record, or prejudiced by the judgment, and, therefore, to receive advantage by the reversal of it." It would seem from the rule, that privies, or those who might be prejudiced by the judgment, may maintain a writ of error as well as parties. In respect to privies, there can be no doubt that they may. It is every day's practice to permit privies in blood, as the heir, and privies in representation, as the executor or administrator, to maintain writs of error in their names to reverse judgments rendered against the ancestor or testator or intestate. We perceive no reason why the rule should not hold in every other case of privity. Privies, according to the definition given in Jacob's Law Dictionary, are "those who are partakers or have an interest in any action or thing, or any relation to another." Now, Marr has clearly shewn, that he had an interest in the debt for which the action was pending. His interest was of such a character as gave him the right to use the name of Drieblebiss in prosecuting. It was an interest which the court was bound to protect according to repeated decisions of this court by allowing him to use the name of Drieblebiss. Indeed, he was so far a party in interest as that a plea of set-off might have been

General rule is, that no person can maintain a writ of error who is not a party or privy to the record, or prejudiced by the judgment.

No perceptible reason why all other privies, as well as those by blood or representation, cannot maintain a writ of error.

Privy in interest may maintain a writ of error.

If, after nominal plaintiff has assigned to another the benefit of the suit, the court err in dismissal of it on the order of the nominal plaintiff.



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successfully pleaded against him. *Ward vs. Martin*, 111 Mon. 19; *Carlisle vs. Long*, 1 Mar. 486.

But whether Marr be, strictly speaking, privy or not, the judgment rendered in the present case directly operates to his prejudice. Drieblebiss had removed from the county before the court at which the judgment was rendered, and, whether he be solvent or insolvent, his removal was calculated to obstruct Marr in the recovery of his debt, and he might lose it altogether unless he could make it of Hanna upon the pending suit, the benefit of which was assigned to him. If, then, the judgment rendered was calculated to defeat his rights, we perceive no reason why he may not, on account of such prejudice, maintain the writ of error. If the circuit court erred, to his prejudice, in dismissing the suit, he may reverse that judgment even against the will of Drieblebiss. And, as he was a party to the motion, the writ of error may be prosecuted in his name.

We shall proceed to enquire into the merits of the case.

When it appears that nominal pltf. has assigned to another the benefit of the suit, a receipt given to the defendant by the nominal pltf. and which also directs a dismissal of the suit, is insufficient evidence to authorize the court to dismiss the suit. Such receipt is no evidence, against the beneficiary, that debt has paid the debt.

It is perfectly clear, that the benefit of the debt against Hanna had been transferred to Marr before Hanna paid it to Drieblebiss. Indeed, there is no evidence that he ever paid Drieblebiss, for the receipt Drieblebiss, as against Marr, is no evidence of that fact. *Davidson vs. Berthoud & Son*, 1 Marshall, 354. When Marr shewed that the debt had been transferred to him, (before there is any pretence for saying that Hanna had paid it,) whereby he was authorized to proceed with the suit in the name of Drieblebiss, the court should have required Hanna to prove the actual payment of the debt by the oath of some witness. The conduct of Drieblebiss is subject to strong suspicions of fraud. It would seem from his receipt to Hanna, that he had, after transferring the debt to Marr, collected the money and left his creditor unpaid. Hanna has not acted in good faith if he paid Drieblebiss, after he knew that the debt had been transferred to Marr. It may be that Hanna has not paid either, and that he has done no more than to enter into an arrange-

ment by which he has secured further time. Whatever may be the truth, it is not manifested by the receipt of Drieblebiss, which is no more than hearsay when made to operate on Marr. If Hanna obtained the receipt of Drieblebiss before notice of the transfer of the debt to Marr, then the receipt is, *per se*, conclusive evidence of payment as against Drieblebiss, the plaintiff in the action. But if he had notice of the transfer before he obtained the receipt, then, as against Marr, the receipt is not even *prima facie* evidence that the debt was paid. We shall not undertake to decide whether Hanna had or had not notice of the transfer at the time he obtained the receipt from Drieblebiss. That is a matter of fact which belongs to a jury, and ought to have been submitted to one after Marr had shewn his interest in the suit and debt. The circuit court should have required Hanna to plead. If he filed a plea of payment to Drieblebiss since the institution of the suit, Marr, using the name of Drieblebiss, might reply, that the debt and benefit of the suit had been transferred to Marr before Hanna had made any payment to Drieblebiss, and that Hanna had notice of such transfer before he made any payment to Drieblebiss. In this way the merits of the case might have been reached and fairly decided by a jury, the proper tribunal to settle litigated facts.

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When nominal plaintiff has assigned the benefit of the suit to another, and afterwards given to defendant a receipt against the debt, the question whether defendant had notice of the assignment of the benefit of the suit before he paid it, must be decided by a jury, and not by the court.

The judgment of the circuit court is reversed, and the cause remanded for proceedings not inconsistent with this opinion.

The plaintiff in error must recover his costs.

*Brown*, for plaintiff; *Crittenden*, for defendants.

## Rucker vs. Bosworth.

Error to the Fayette circuit; HICKER, Judge.

Case 192.

*Fines. Remission of fines.*

Judge NICHOLAS delivered the opinion of the court.

November 2.

RUCKER, as an informer, obtained judgments in the name of the Commonwealth, before a justice of the peace, for a number of fines,

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which were collected by a constable and paid over to Rucker. Subsequent to the payment of the fines to Rucker, a remission thereof was obtained from the governor. Bosworth then instituted this suit for the recovery of the amount of the fines so paid Rucker, and having obtained a verdict and judgment therefor, Rucker prosecutes this writ of error.

After a fine has been paid over to the informer, his right is indefeasible, and a subsequent remission of the fine, by the Governor, will not give the person fined a right of action to recover back from the informer the amount of the fine so paid to him.

We think Bosworth had no right to recover. The fines having been collected and paid over to the informer before the remission, his right thereto became absolute and indefeasible. There was nothing left upon which the remission could take effect. A remission is not in the nature of nor does it operate like the reversal of a judgment. It is more like, and operates as a release. After the payment of a debt or demand, a release of it operates nothing. So after the payment of the fines to the prosecutor to whom they belonged, the governor's power of remission was either gone or of none effect.

Judgment reversed, with costs, and cause remanded, with directions for new trial and further proceedings consistent herewith.

*Payne*, for plaintiff.

TROVER.

## Youngs vs. Moore.

Case 193.

Error to the Bath Circuit; ROBBINS, Judge.

*Trover, action of. Sales under fi. fa. Officious interference of strangers in the execution of a fi. fa.*

November 3. Judge NICHOLAS delivered the opinion of the court.

MOORE sued the Youngs for the trover and conversion of his horse, taken and sold by the sheriff under a *fi. fa.* in favor of the defendant, James Young, against a third person, and obtained a verdict and judgment against them.

If a stranger to an execution officiously undertakes to point out, and direct the

In the progress of the trial, the defendant, Thomas J. Young, moved the court to instruct the jury, that if they believed he had no interest in, but was a mere stranger to the execution, they should find for him even though he had pointed out and direct-

and the sheriff to levy the execution on the horse. This instruction the court properly refused to give.

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It is said, that an action of trover does not lie against a sheriff or any person, who, by his command, assists in the execution of a *feri facias*, although there was no judgment to warrant the issuing of the writ, for they had done no more than obey the writ, which it was their duty to do. But if a stranger officiously assist the sheriff in the execution of such a writ, he is liable to the action of trover; for, as he acts officiously, it is incumbent on him to take care that there is a judgment to warrant the writ. VI Bacon Ab. 692, and authorities there cited. In *Britton vs. Cole*, XII Mod. 178, it is said by Holt, C. J., if there be no judgment, and a *ca. sa.* or other execution is taken out, the sheriff, and all other persons acting under him, are justifiable; but, if a stranger of his own head interposes, who is not concerned, and he sets on the sheriff to do execution, he cannot justify this. So, also, we infer that a stranger is liable to the action when he officiously undertakes to point out and direct the sheriff to levy on property not subject to the execution.

sheriff to levy on property which is not subject to execution, and the sheriff sells the property so pointed out, such stranger is liable to an action of trover and conversion by the owner of the property so sold.

Plaintiff in an execution is not liable to an action of trover and conversion for sale of property under the execution which was not subject to it, unless he directed the sale.

But as there was no proof conducing to shew, that James Young, the other defendant, directed either the levy or sale, the jury ought not to have found against him. The mere fact of his being the plaintiff in the execution did not render him liable.

Judgment reversed, cause remanded with directions to set aside the verdict, grant a new trial, and for further proceedings consistent herewith. Plaintiffs in error to recover costs.

*Triplett*, for plaintiffs; *Trimble*, for defendant.

**Buckner's Devisees vs. Morris.**

Case 179.

*Devisees, action against.*

November 3. Judge UNDERWOOD delivered the opinion of the court.

Surety who has paid debt of his principal, and afterwards obtained judgment against his executor and had a *fi. fa.* returned "no property found" may maintain an action against the devisees.

THE process not having been properly executed on John Buckner, the pleas cannot, according to former decisions, be construed to make an appearance for him. It was, therefore, erroneous to try the cause without proper service on him.

We think the action can well be maintained against the devisees.

Judgment reversed, with costs, and cause remanded, with directions to set aside the verdict, and for further proceedings.

*Morehead and Brown, for plaintiffs.*

*The counsel for the plaintiffs in error filed the following petition for a re-hearing:*

Petition for a re-hearing.

THE counsel for the plaintiffs in error would respectfully ask the court to review that part of the opinion redereed in this cause, which declares that the action may be well maintained. Their belief that the law has been differently understood and acted upon by the profession generally, and the importance of settling it correctly in the first case in which the question has been directly made before this tribunal, more than any particular interest they feel in the present contest, have induced them to present this petition. A very brief statement of facts will suffice to present the question of law involved. Morris was the surety of Philip Buckner in a joint and several note executed to William Owens. A suit was commenced upon the note against both obligors, but before judgment was recovered, Buckner departed this life, and the judgment was rendered against Morris alone, who having paid it off recovered return a judgment against the executor of Philip Buckner, on which an execution issued, and was returned no property; after which this suit was instituted against the *devisees alone*. Can it be sustained under the act of 1819, 1 Dig. 652? is the question. Before the act of 1792, heirs or devisees were only

liable on contracts in which they were expressly bound. By that statute they were made *jointly* liable with executors or administrators in all cases in which the executors or administrators could be separately sued. The act of 1819 authorized a separate suit "*on a contract on which a joint action might have been maintained against the executor or administrator and the heirs or devisees of the deceased person.*" It is respectfully suggested, that the word contract, used in this act, does not embrace that class of cases coming under the general denomination of implied undertakings. It was held in ancient times that an action at law could not be maintained in favor of a surety in a bond who paid the debt of his principal, but it is now allowed in consequence of the equitable principles of *assumpsit*, the law implying an undertaking to pay. See II Term Rep. 105 ; III Christian's Blackstone, 163.

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This undertaking is not a contract in the sense in which that term is used by the statute, but a mere duty. The act of 1792 gives a joint action in all cases where the executor or administrator might be sued alone; the act of 1819 uses less comprehensive language, and allows a separate suit against the heirs or devisees, only in the case of a *contract* on which a joint action might have been brought. Such seems to have been the opinion of this court, in the case of *Bedell's Administrator vs. Keethley*, V Mon. 600, in which the subject is incidentally treated. That was a case of an implied undertaking, where a separate judgment had been recovered against the personal representative, and the counsel below supposing that there was no remedy at law against the heirs, filed a bill to render them liable. The court, speaking in reference to this state of case, says, "that the remedy by the act of 1792 was statutory and must be pursued, and if the heirs were omitted in the first action, there was no express provision for suing them subsequently, in a separate suit, until the passage of the act of 1819, which authorizes a separate suit against the heir, *in the case of contracts*, and that it might be insisted that there was no remedy to reach the real assets in the heirs, except in cases of contracts, unless the chancellor will interfere."

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It is evident, as the case before the court was that of an implied undertaking, that it was supposed not be embraced by the term contract in the statute. In consequence of that, the court went on to discuss the question, whether, after prosecuting the personal representative unsuccessfully, a new suit might be maintained, including therein, a second time, the personal representative with the heirs or devisees. Of what moment was it to discuss that question, if the suit might have been maintained against the heirs alone?

This construction of the act of 1819, has been recognised, and, as we humbly conceive, acted upon, in the case of *Lansdale's Administrator vs. Cox*, VII Monroe, 404. In that case, the court uses the following language. "The action at law, then, by one surety against his co-surety, arises out of an implied undertaking, not by force of express contract, and consequently the heirs cannot have been expressly bound by the ancestor. So that the action at law by one surety against the representatives of a deceased co-surety must, by the principles of the common law, be against the executor or administrator. To reach the heirs in a suit at law, the remedy given by our statute in such cases must be jointly against the executors or administrators and heirs, *not against the heirs alone.*" In this case, we would ask, when did the liability or duty accrue? The judgment was not recovered in the testator's life time, nor was the money paid until long after his death. The law raised no assumpsit, no promise by implication, until the surety paid the money. The money was paid, laid out and expended, not for the use of the testator, but of the executor. The heirs were not expressly bound, and we do not suppose that in that state of case it could be gravely contended, that they ever came under an implied undertaking to the surety of their ancestor. So that, whether the word contract, in the statute, be construed as an express or implied one, or that of the ancestor or heir, it would equally follow, in this case, that the action could not be maintained.

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*Chief Justice Robertson delivered the Opinion of the Court* **MOORE**  
*as follows :* **vs.**

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THE act of 1792 embraces all contracts express or implied ; and the act of 1819 is equally comprehensive, and applies to all cases to which the act of 1792 applies ; and we have seen no authority to the contrary.

Petition overruled.

## Moore vs. Allen and Grant.

Error to the Fayette Circuit ; HICKAY, Judge.

Case 195.

*Bond to keep prison rules. Process from federal court.  
 Congress, its powers.*

Judge UNDERWOOD delivered the opinion of the Court.

November 5.

THE opinion originally delivered in this cause, and which has been improperly published in the third volume of J. J. Marshall's Reports, 612, contains a statement of the facts of the case. Upon re-argument, we were referred to the case of *Barns vs. Williams, II Bibb, 562*, as being incompatible with the doctrines laid down in the original opinion. We confess that this case is an authority in point, and unless directly overturned, would be conclusive to shew, that the jailor was authorized, by law, to take a bond for the prison rules, from a debtor confined by a *ca. sa.* issuing from the office of the federal court. We deem it unnecessary to consider the question whether, on principle, the case in *Bibb* can be supported. Its doctrines are fortified by the case of *Randolph vs. Donaldson, IX Cranch, 76; III Condensed Reports, 280*; and, therefore, if the laws of the state stood now as they were when *Hopkins* executed the bond to the jailor, *Barns*, and the bond in the present case had been taken in conformity to them, we would acquiesce and give validity to the bond, following the principle of the foregoing adjudications. But the laws are not the same. The prison bounds have been enlarged to the limits of the state since that period, if not abolished altogether, and unless Congress has prospectively adopted

Bond for the prison rules, taken by a jailor, from a debtor confined by a *ca. sa.* which issued from the office of the federal court, decided to be void.



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the legislation of the state upon the subject, there was no law authorizing the jailor to give a prisoner, committed by the authority of the United States, the bounds of the state by taking such a bond as that on which this suit has been instituted.

Congress cannot delegate its own legislative powers to the state legislature, or adopt, prospectively, such laws as a state may thereafter pass upon any particular subject.

The power of members of Congress is a personal trust, which cannot be delegated.

Act of 1822, extending the prison bounds to the limits of the state, did not operate in favor of debtors confined under process from the courts of the U. States.

We do not concede that the legislature of the nation has prospectively adopted the legislation of the state. It has made no direct attempt to do so, and if it had, we deny the power. The legislative authority of congress cannot be delegated to the legislatures of the states. The power confided to members of congress is a personal trust, which cannot be transferred by them. When called on to account to their constituents for their conduct, it would be at war with our whole system to excuse them upon the ground that they had delegated their powers to the legislature of a state. The people, according to our frame of government, confide in the wisdom of their representatives in congress to make laws national in their operation. They do not rely upon such substitutes as congress may appoint. We are, therefore, of opinion, that the act of the Kentucky legislature, passed in 1822, extending the prison bounds to the limits of the state, or, in effect, abolishing the prison bounds which congress had, by its legislation, adopted, could not operate in behalf of debtors confined under process from the courts of the U. States. At the time congress extended to prisoners, confined under federal authority, the prison yards or walks allowed by the laws of the states, they were regulated with a view to the health of prisoners. The act of 1822 was passed with the view to enable prisoners to pursue their ordinary avocations without restraint, and was so far the introduction of a new principle never sanctioned by congress. If it be true that the prison limits and jail are the same thing, then our whole state has been converted into a vast prison by mere act of legislation. The continent might be made a prison in the same way. If, therefore, the jailor had authority to take the bond sued on, from Hanna, with Moore as his surety, he could not legally have allowed Hanna the prison limits exceeding ten acres.

But at the time the jailor took the bond in ques-

tion from Hanna and Moore, he had no authority to take a bond with such a condition from any debtor who may have been delivered to him under a *ca. sa.* issuing from the clerk's office of a state court. Imprisonment for debt was abolished in this state by an act of 1821, 1 Dig. 503. Thereafter, jailors had no right to retain in their custody the person of a debtor committed after the act took effect. It follows conclusively, that if they had no right to keep the body, they had no right to take a bond for the prison limits; for the privilege of the bounds is no release or discharge from prison. The person restricted to prison bounds, is still a prisoner in contemplation of law. If, therefore, the bond in question be tested by the laws of the state alone, it is invalid, because it is contrary to law, and hence the jailor had no right to take it. It may be asked, why did the legislature of Kentucky, in 1822, after the abolition of imprisonment for debt, extend the prison rules to the limits of the state? It is not necessary for us to attempt an answer. It certainly was not necessary to do so with a view to afford ease and comfort to persons confined for debts under the laws of the state, because there could be no such persons. If it was designed to favor the prisoners committed under federal authority, it was an act of legislation interfering with the laws and policy of the United States, over which the states have no rightful control.

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Viewing the case, in all its aspects, under the new light shed upon it by the re-argument, we have reached the conclusion that the bond sued on is void.

Wherefore, the mandate of the former opinion, the Chief Justice dissenting, must remain unchanged.

*Owsley, Monroe and Chinn, for plaintiff; Denny, Wickliffe & Wooley, and Combs, for defendants.*

*Chief Justice Robertson, dissenting from the majority of the court, delivered his own opinion as follows:*

I did not concur in the former opinion Dissent. delivered in this case, because it was my opinion, that the bond was legal and should be enforced. I

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believed that the jailor had a right to take the bond, and I thought that there was nothing illegal in its condition. My opinion remains unchanged.

The authority of the jailor to take the bond being now conceded, no argument is necessary to support it.

But it is said, that the bond is void, because, as argued, there was no law of the United States enlarging the prison bounds to the limits of the state. This I cannot admit.

*This argument was not touched until the re-argument.*

By the first section of an act of congress of 1800, it is declared, "that persons imprisoned on process issuing from any court of the United States, shall be entitled to like privileges of the yards or limits of the respective jails as persons confined, in like cases, on process from the respective courts of the states are entitled to, and under the like regulations and restrictions."

Prison bounds, "yards" or "limits" are, in legal contemplation, *an extension of the walls of the jail.*—*Stierman et al. vs. Tabb et al.* III Bibb, 202.

In 1821, the *capias ad satisfaciendum* was abolished by the legislature of this state. And by an act of 1822, our legislature expanded the prison bounds to the limits of the state. The foregoing act of congress had not been repealed when the bond, I am now considering, was executed conformably to the act of 1822 of this state.

It is my opinion, that the act of congress, which has been quoted, is prospective in its operation, and therefore adopts the Kentucky statute of 1822. I do not doubt the power of congress to impart to such an act such capacity and application. It is not necessary now to discuss the power of congress to delegate its legislative authority. But that congress may, by the exercise of its legislative function, communicate power which is, in effect, legislative, cannot be denied. Illustrations are deemed superfluous.

Every court possesses an inherent power to enforce its own judgments; and, unless restricted by legislation, has, necessarily, a right to regulate its

own process. If, therefore, congress had passed an act declaring that the courts of the United States might adopt and regulate their own modes of enforcing their own mandates, the validity of such an act could not have been questioned, even though it had been considered an act delegating legislative power.

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If the act of 1800 be, as I suppose, prospective, it should not be deemed a delegation of legislative power, by congress, to the state legislatures. It only prescribes to the federal courts such rules as the states shall prescribe to the state courts. If congress had power to allow the federal courts to adopt rules for enforcing their own judgments, it certainly had power to authorize them to adopt the rules which had been or *should be* prescribed to the state courts by the legislatures of the respective states; and, of course, it had power to declare that the rules which the states should, from time to time, establish *should be* the rules of the federal courts.

But argument on this subject is superseded by authority. In *Wayman vs. Southard*, X Wheaton, 1, and in the *Bank of the United States vs. Halstead*, 1b. 51, the supreme court of the United States decided that congress has power to "*delegate*" to the federal courts the right to modify their own process and rules of proceeding, and also has power to adopt, *prospectively*—as they may be established by the state legislatures—the process and rules of the state courts. These decisions are authoritative in this case, and in all similar cases, in this court; and even if they were not as reasonable as they are authoritative, I could not feel at liberty to question or disregard them.

There is nothing in the first section of the act of 1800 inconsistent with the prospective interpretation which I think it should receive, and that interpretation is not only authorized by the letter of the act, but is fortified by its policy and by the language used in the acts of 1789 and 1792, and the uniform construction of some of the provisions of those acts.

The great object of the federal constitution was to establish and preserve the union of the states. In its

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legislative function the general government is national ; its laws operate directly on the citizen, who is also subject to the legislative action of his own state. Nothing can be more essential to union than harmony in the action of the federal and state governments on the individual rights of the citizen, in the administration of law through the instrumentality of courts of justice.

Where the process law of the general government is more rigorous or summary than that of the state government, such a discordance and disparity in the operations of the two governments may tend to generate a correspondent feeling of jealousy and alienation, and create a disposition to consider federal authority as irksome and foreign. But when the citizen is treated alike by both governments, and especially when the judicial process of each is the same or similar, he has every motive to cherish the same affection for each, and to consider both as equally *his*, and alike necessary to his welfare. Moreover, uniformity in the administration of the laws, as far as may be consistent with justice, is recommended by habit and convenience. Hence it is, and ever has been, the policy of the general government to conform, in a great degree, to the process laws of the states ; and the general practice has corresponded with that policy.

Hence I am the more strongly inclined not to give a restrictive construction to the act of congress of 1800 ; but, by liberally construing it according to its object as well as tenor, to consider it as adopting, for the federal courts in each state, the prison rules as they should be modified, from time to time, by state authority. Besides, as the prison rules of the several states were materially different at the date of the act of 1800, it is evident that congress could have been influenced by one consideration only in adopting them, as they were, with all their discrepancies, and that is, a sense of the fitness of uniformity, in that particular at least, in the action of the federal and state judiciaries. The same motive would have prompted the adoption, prospectively, of the prison rules in each state as modified, and whenever modified by each ; otherwise the incon-

gruity, which the act of 1800 was intended to prevent, would have soon and certainly resulted, and thus the chief purpose of that act would have been frustrated.

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The process acts of 1789 and of 1792, adopted the state process as it then was in each state. Each of those acts contains the words—"as now used"—in the state courts: and that was the reason why each was restricted by the supreme court to the process of each state as it was at the date of the act. See *U. S. Bank vs. Halstead*, (*supra*.) But the act of 1800 omitted the words—"as now used"—and contains nothing of the same or like import. And I must infer, that congress had some motive for dropping those words when the statute of 1800 was enacted; and that was, as I suppose, a desire to adopt the prison rules of the respective states as they might happen to be at any time afterwards, until altered by act of congress.

The 34th section of the judiciary act of 1789 declares that, "the laws of the several states, except where the constitution, treaties or statutes of the U. States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

That section has always been construed to be prospective in its operation, and to embrace state "rules" as they should arise. See the cases already referred to in *X Wheaton*. The uniform construction of the 34th section of the act of 1789 fortifies the interpretation I have given to the act of 1800; for the language of each is substantially the same. It does more. It shews that, in relation to some subjects about which congress may legislate, it may so legislate as to adopt, prospectively, the legislation of the states. Unless such prospective legislation, as to process, be effectual, land would not have been subject to sale under an execution from a federal court in this state; because, in 1792, when the last process act was passed by congress, and which adopted the state process laws, land was not liable to execution in Kentucky.

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Other considerations might be urged. It was known that the prison bounds, as existing in the several states in 1800, were liable to extension and material modification, and even to abolition, by state authority. It cannot be *presumed* to have been the intention of congress to retain them, as they were in 1800, unless they should remain the same under state authority.

If a state, having prison bounds in 1800, had abolished them in 1801, I cannot believe that the national legislature intended that, though abolished, they should still be allowed under process from a federal court; or if a state having no prison bounds in 1800, had prescribed bounds in 1801, I cannot admit that, under the act of 1800, there would have been no prison rules for a federal court in such state. In a state which had altered its prison rules since 1800, it would be difficult for a ministerial officer *afterwards* to identify the limits which had been abolished and disused; and inconvenience, uncertainty and confusion would result from an adherence to them by the federal government. And why should not the substituted bounds be observed under federal as well as state process? The original limits had been adopted *because they were the rules for state process*, and for no other reason. The substituted rules are recommended by the same controlling consideration. But, as already suggested, the prison rules are but an extension of the prison walls; and, as the general government uses the jails of the states, it would be unreasonable to suppose that the act of 1800 intended that they should be used in any other way than the states should prescribe, that is, with the walls, *legal* as well as *actual*, as defined and constructed by the states at the time when used.— And this and nothing else is imported by the letter of the of the act of 1800. It declares that persons imprisoned under federal process shall be entitled to the same privileges as persons confined under state process are entitled to, that is, as persons confined under state process are entitled to *at the same time*, or *when the federal prisoner is in custody*. The state and federal prisoners shall be entitled, *at the same time*, “to the same privileges,” and shall be subject to

the "*same rules and regulations.*" In my opinion, such are the letter and spirit of the 1st section of the act of 1800; and if I had doubts on this subject, I should not be inclined to give such a construction to the section as would make useless and invidious discriminations between citizens of the same commonwealth supporting and supported by the same institutions. Before I would come to such a conclusion, *on such a subject*, I would require a clear and distinct expression of legislative will to sustain me. But that will, as I understand it, is plainly irreconcilable with such a conclusion. The act of 1800 adopted the state prisons, not as they then were, but as they should be, and *wherever* they might happen to be situated at any future period. So far the act was not only contingent and prospective in its application, but might (with as much propriety in this respect as it could be in relation to the prison rules) be deemed a delegation of power to the legislatures or county courts of the states to erect, preserve, regulate and even change the sites of jails for the United States. But it was only a declaration to the federal courts of the will of congress that they should use the state jails under state regulations.

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If, in a particular state, the prison walls should, in consequence of state regulation, be, in legal contemplation and effect, coterminous with the boundaries of the counties in which they are placed, those prisons, *with those legal bounds*, are the "*prisons*" of the general government, with the consent of the state. And, therefore, the prison bounds, as prescribed by the act of 1823 of the Kentucky legislature, were the prison bounds of the general government *until altered by the authority of the one or the other government.*

But it is said that, at the date of the bond, no citizen could have been lawfully imprisoned in this state for debt in consequence of any judgment or decree of a state court, and that, therefore, the act of 1800 did not authorize the jailer to allow to Hanna the limits of Kentucky as prison bounds, and, consequently, the bond was illegal and void.

I do not admit either the postulate or the conclusion, as thus stated.



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Dece.

It is my opinion, that a citizen who had been (since the abolition of the *ca. sa.*) imprisoned for failing to give special bail, and had been confined until after judgment against him, might have been retained in custody until he either satisfied the judgment, or took the oath of an insolvent debtor. There is nothing in the provisions of the act of 1821, abolishing the *ca. sa.*, inconsistent with such an opinion; and it seems to me that any other opinion would render so much of the act as allows a creditor to require special bail, incongruous and nugatory. The act declares only that a *capias ad satisfactionem* shall not be issued. It certainly does not even intimate that a person imprisoned for failing to give special bail (when legally required) shall be liberated by the obtainment of a judgment against him. If this view be correct, the bond cannot be illegal. But even if it be incorrect, still, I think, the bond is valid and legal.

Congress had not abolished the *ca. sa.* or enacted any process law adopting, prospectively, state laws regulating the process of state courts. Then it was lawful to imprison Hanna upon a *ca. sa.* As the legislature of this state had abolished all pre-existing prison rules, and prescribed the limits of the state as the only prison bounds, Hanna was entitled either to those bounds or to none, unless the foregoing exposition of the act of 1800 be altogether erroneous. For if it be correct, the bounds prescribed by the act of 1822 were the bounds prescribed to the federal court: and if a citizen could not have been imprisoned under a judgment of a court of the state, and if, as argued, a prisoner under federal process shall be entitled only to the prison bounds to which he might (at the same time) have been restricted by the authority of a state court, the consequence would be that Hanna was not entitled to the benefit of any prison rules. Should the abolition of the *ca. sa.* produce any such consequence as that last mentioned? The meaning of the act of 1800 is, that the federal courts, until otherwise declared, shall use state prisons in such condition, with such rules, and under such regulations as they might find them under state authority; and that a person imprisoned under process from a

federal court shall be entitled to the benefit of such prison rules *as he would have been entitled to if he could have been imprisoned under process from a state court.* As the general government is dependent on the comity of the states for the use of their prisons, surely it is but reasonable that the benefit be enjoyed according to the will of the states, and under state regulations. I have no right to enquire into the *motive* of the act enlarging the prison bounds in 1822. The legislature had a right to pass it. The general government *has conformed to it*: and who, has a right *now* to arraign its motive or question its validity? If the federal court had not acquiesced in it, then the state might have considered its power of withholding from that court the use of the state prisons, and have acted upon its own judgment of its own rights and obligations. The chief object of the act of 1800 was to prevent any danger of such collision as might have been thus provoked.

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Dissent.

But whatever should be the proper construction of the act of 1800, the federal court had competent authority to conform to the act of 1822, and it has done so; and congress too, *knowing all the facts, has approved* by acquiescence. It seems to me, therefore, that the jailor had no authority to take any other bond than that which he did take, and that, consequently, that bond is binding.

If the act of 1800 should be construed to mean that Hanna was entitled to the benefit of the prison rules *only when* he might have been imprisoned under state process, then, if he could not have been so imprisoned at the date of his bond, he had no right to the benefit of *any* prison bounds. Such a consequence, inevitable from such premises, tends, by its absurdity, to shew that the premises are untrue, and that he was entitled to the prison and prison rules as established by the law of the state at the date of his bond. A *ca. sa.* could be issued against him, notwithstanding its abolition by the state: he could, therefore, be imprisoned; and the act of 1800 should not be so construed as to deprive him of the benefit of the prison rules merely because a *ca. sa.* could not be issued upon a judgment of a state court. That act means, not that he should have no prison

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rules when, by the laws of the state a *ca. sa.* could not be issued, but that he should have the benefit of such rules as belong to the jail under the law of the state, and as he would have been entitled to if he could have been imprisoned under state authority. And thus the legislature of 1822 understood the act of 1800; and the federal court seems also to have acted accordingly. I am unwilling to say that all this was wrong, and that the bond is void.

If a state shall act unreasonably or unjustly, congress may interpose and prescribe other rules for the federal courts. But until congress shall so interpose, the state rules should be also the federal rules. And I cannot admit that congress has no power to direct the courts of the United States to conform to the entire process of the states, as it may be whenever process may be issued from the office of a federal court. Such a doctrine would operate inconveniently and injuriously, and would seem to me to be inconsistent with the harmony and the genius of an *imperium in imperio*. In such a matter I am unwilling to deny to congress the right to defer to the wisdom of the states.

Wherefore, it is my opinion, that the judgment of the circuit court is right, and ought to be affirmed.

[This Petition for a Rehearing was accidentally pretermitted. It was misplaced, not being with the Opinion of the Court, but filed according to the date when overruled. The Reporter, not considering himself at liberty to pass it over, has published it, hoping that those concerned will not suppose he intended either neglect or slight. The opinion is to be found at page 410.]

*In the case of Fightmaster et al. vs. Beasley, the counsel for the plaintiff in error, filed the following petition for a re-hearing, which was overruled.*

THE counsel for the plaintiff in error has not understood the record of this case as the court has stated it, and, therefore, a re-hearing is moved.

It was supposed to be material, that the defendant had not purchased the slave in question, at a sheriff's sale, under an execution against the assets in the hands of Samuel Rowsee, as administrator of William Rowsee, deceased; but the purchase was made, if at all, under an execution against Samuel Rowsee's own estate.

This is the record. A judgment was recovered against Samuel Rowsee, as administrator of William Wooldridge, to be levied of the assets, and on that, an execution did issue against the assets, but that execution was replevied, and a bond given and returned. On this bond, in which Rowsee was individually bound, a *feri facias* issued, commanding the sheriff, "that of the estate of Samuel Rowsee, administrator of William Wooldridge and Thomas Smith, you cause to be made the sum of one hundred and forty dollars" &c. See the transcript of the record, page 16 to 31 inclusive. On this execution, the sheriff had the right to seize the individual property of Rowsee most undoubtedly; and he could not have had the right to seize and sell the goods or chattels of the intestate in the hands of the administrator unless he had the right to levy

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upon either, which he certainly had not. It was, therefore, supposed that the defendant derived no title whatever to the slave by the sheriff's sale under the execution, according to the plaintiff's evidence, nor according to the record evidence given by the defendant. If the defendant had any title by his purchase, it can only be made out by the parol evidence of the defendant, which he gave, conducing to prove that Samuel Rowsee had himself, whilst he had the right to do so, given up the slave to the sheriff to be sold, and stood by at the sale, so as to make the sale, in legal effect, his own sale.

The court has not distinguished between the plaintiff's and defendant's evidence, in the statement of the case, in the opinion delivered. The plaintiffs did not prove that the defendant had purchased the slave, at the sheriff's sale, under an execution against the assets in the hands of Samuel Rowsee, as administrator of William Wooldridge, nor against the estate of Samuel Rowsee himself, nor offer evidence conducing to prove such fact. The plaintiff's evidence consisted of the will of William Rowsee the elder, the deposition of Phebe Rowsee, found in the transcript on page 51 to 63, and the evidence of Merritt Rowsee on page 101 and 101. Merritt Rowsee says nothing of the sheriff's sale, and all Phebe Rowsee says is merely by way of accounting for her going to the house of the defendant and making a demand on behalf of the plaintiffs, and the conversation then had with him, which the plaintiff gave in evidence, to prove the conversion of the property. These are her words on this subject. She was asked by the plaintiff this question. "How did Royal come into the possession of the defendant, Beasley?" And she gave this answer. "Samuel Rowsee came near to Westport and requested me to let Royal go up with him to New-Castle to see his (Royal's) grandmother, and I consented for him to take him along. Some time afterwards, I heard he was sold by the sheriff."

She was then asked this question. "State whether you ever, as guardian of the children, or in their behalf, applied to the defendant, Beasley, for

the said boy, Royal, and what was his answer &c." **FIGHTMASTER ET AL.**  
 To which she answered. "Hearing of the purchase **VS.**  
 of the boy by Beasley, I went out to see him, and **BEASLEY.**  
 asked him if he would part with him; and he answered that he would not, that he had purchased **Petition for a**  
 him for his own use. I was much dissatisfied when **re-hearing.**  
 I heard of the sale in consequence of his being a family negro. This was a few weeks after the sale."  
 See page 54 and 55 of the record.

The above is all that is to be found in the plaintiff's evidence in relation to the sale. What the witness says is mere inducement to the material facts. She states and she speaks only of hearsay. And besides, nothing is said by her to prove how the sheriff had sold the slave, under what process, or by what authority, and certainly nothing from which the jury were bound to infer that the sale had been made under the execution the defendant afterwards produced, or by the authority of Samuel Rowsee or any one else having any right.

The evidence of the sheriff's sale all came from the defendant. It consisted of the record of the judgment, execution upon it, the replevin bond, execution thereon, and sheriff's return in the case of a creditor of the intestate, Wooldridge, against Samuel Rowsee—(from which it could not appear what property was sold by the sheriff)—and of the testimony of witnesses in which there is some discrepancy; and which, however consistent, did not conclude the plaintiffs.

This particularity is observed in the statement, for the purpose of shewing to this court, that, in deciding upon the most important instructions given to the jury by the circuit court, the evidence given by the defendant cannot be brought into view at all. In other words, the object is to clear the case of the title set up by the defendant, and attempted to be proved by his testimony, whilst those instructions of the circuit court, which were, in effect, directions to the jury, as in the case of a non suit, are considered. And this being accomplished, it is respectfully suggested, that it will manifestly appear on the face of the opinion delivered by this court, that an important position, on which the decision is

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evidence could be withheld from a jury, the point will not be dwelt upon. It does seem, also, to be very plain that the jury would have been authorized to infer a right in the plaintiffs to the share of Wm. Wooldridge. He had always, from 1811, declared he held the slave as the property of his children, and not as his own. Samuel Rowsee had never set up any claim whatever to the property in either of his characters. The case then stood precisely, on the plaintiffs' evidence, as it did when it was heretofore before this court, on the appeal from the Henry circuit court.—See the opinion, as reported in Monroe, and the bill of exceptions in the old record, herewith furnished. The court then decided that the court below erred in the instructions to find as in case of a non suit.

No better right now appears than did then. And this court then decided that the case ought to have been left to the jury, no matter what was the construction of the will. The possession that was then proved, is the same that appears in this record.

The court have said, in the late opinion, that it was not disposed to think the plaintiffs were in the actual possession of the slave, but certainly that was a question of fact, and it is confidently believed that no jury could have hesitated to find it, on the *plaintiff's evidence*, for them. And it must not be forgotten that *that* alone is to be considered in this discussion.

Certainly the person in possession of a slave, and claiming the right to it, does not lose that possession by allowing it to visit its kindred, even if it does go in company with the better owner, unless such owner assumed some exercise of ownership or control over the property; and the *plaintiffs*, in this case, gave no evidence conducing, in any degree, to prove any such fact. The plaintiffs, then, had possession, as the jury might have found; and for this cause, and by the acquiescence, acts and declarations of those who may have been once the owners, the plaintiffs had the right of property, *prima facie*, at least. Indeed, the court is understood as conceding to the plaintiffs a right of action, *prima facie*, but the opin-

lon then proceeds to determine that it was not maintainable against the defendant because he was a *bona fide* purchaser for at least one third of the interest. This was certainly approving an instruction to the jury to find as in case of a non suit, because it seemed to the court the defendant's evidence proved facts sufficient to obviate the plaintiff's proofs.

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It is stated in the opinion, as a part of the case, that the sheriff levied the execution on the slave as assets in the hands of the administrator, in whose hands he was, in consequence of his request to that effect, at his own house on a visit, and the defendant bought him &c. And the sheriff does state, in his return, that the slave was given up to be sold by the administrator. But this return, read by the defendant, was not conclusive on the plaintiff, who was no party to the record. See *Caldwell vs. Harlam*, III Monroe, 351. And the plaintiff did offer to prove by Rowsee, said to be the administrator, that he had not sold the slave to the defendant, nor any one else, which he certainly had done, in contemplation of law, if he had given him up to the sheriff, and he had sold him accordingly. But the court overruled this evidence, and decided that it could not be given, "because it would be a contradiction of the record, read in evidence, by the defendant." See page 90. The circuit court, in effect, decided, that the defendant's proofs of title were incontrovertible, and that the plaintiffs had none, no matter where the slave was born, and no odds whether he passed by the will or not.

These are the instructions moved by the plaintiff, all of which were overruled :

" 1. That the slave, in the declaration mentioned, passed by the last will and testament of Samuel Rowsee, deceased, and the assent and confirmation of his executrix, Elizabeth Rowsee, in the year 1812 or 1813, as stated by the witness, Merritt Rowsee.

2. That whether, by the letter of the will, the title passed to the plaintiff or not, no title whatever passed by the will, or otherwise, to the administrator of William Wooldridge, unless it is proved to the jury that the testator, Rowsee, did, in his life



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time, make an absolute donation of said slave to said Wooldridge.

3. That, unless the said William Rowsee, deceased, did make an absolute gift of said slave to the said Wooldridge, the said sheriff had no right whatever to levy said executions on said slave, either with or without the consent of the said Samuel Rowsee, and the defendant acquired no title by his alleged purchase.

4. That the slave, in the declaration mentioned, was not subject to sale under the executions under which it is alleged he was sold, and purchased by the defendant.

5. That the possession of the said slave, by Wooldridge, after his wife's death, and of Phebe Rowsee, after Mrs. Wooldridge's death, claimed as the guardian of the children of said Wooldridge and wife, was, in law, the possession of said children, and not such as to subject said slave to the payment of the debts of said Wooldridge.

That, if Samuel Rowsee did consent to the Phebe Rowsee, the assumed guardian of the said children of William Wooldridge, deceased, taking and holding the slave in question as the property of the said children, and she did so hold and possess them, the said Rowsee had no right, even if the said slave did belong to said Wooldridge at his death, to authorize the sheriff to seize and sell said slave under said executions, and the defendant had no right by his said alleged purchase.

If the jury believe the slave in question was loaned by said William Rowsee, and not given said Wooldridge, the defendant had no right to said slave.

If the slave in question was the property of William Rowsee at his death, that the defendant was a man wronged without title, and the jury have a right to presume title in the plaintiffs, from all the circumstances of the case, whether they derive title under the will or not.

That the plaintiffs have shewn, by the facts and circumstances of the case, the length of possession, and manner of holding, the right to recover, if the jury believe the testimony.

That the defendant's testimony constitutes no defence to this action. FIGHTMASTER ET AL.  
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If the jury believe the whole of the evidence in the case, the verdict ought to be for the plaintiffs." Petition for a  
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And the court, on the defendant's motion, instructed the jury as follows :

" 1. That, according to the will of Wm. Rowsee, deceased, none of the children of negro woman, Hannah, the mother of Royal, born before the date of said will, passed, in life estate, to Mrs. Wooldridge, with remainder to her children.

2. That no particular estate for life, with remainder over in slaves, can be created as of legal effect, so as to vest an estate therein in remainder, except the same be made by deed or last will in writing.

3. That if they believe, from the evidence, that no estate vested in the plaintiffs in virtue of the will of William Rowsee, deceased, and that William Wooldridge, their father, died possessing the slave, and that his administrator, legally qualified as such, afterwards delivered him up to the sheriff to be sold in satisfaction of debts due from said Wooldridge in his life time, and that at such sale so made by the sheriff, he was purchased by the defendant, then that they shall find for the defendant in this action.

4. That if they believe, from the evidence, that no estate vested in the plaintiffs in virtue of the will of William Rowsee, deceased, and that William Wooldridge, their father, died possessing the slave, and that his administrator, legally qualified and acting as such, delivered him up to be sold by the sheriff in satisfaction of the executions in the records set out, marked A and B, and that at such sale so made by the sheriff under said executions, he was purchased by the defendant, then that they find for defendant in this action.

5. That the negro boy, Royal, not being specially devised by William Rowsee, passed to his residuary devisees, and Mrs. Wooldridge being one, and living at the death of her father, her interest in the said boy, Royal, then in the possession of her husband, was absolutely vested in him.

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The plaintiff objected, the court overruled all the instructions moved by the plaintiffs, and refused to give any of them, and gave all the instructions moved by the defendants: and further instructed the jury—that, if the slave in question was born before the date of William Rowsee's will, the plaintiff had shewed no cause of action, and the law was, the verdict ought to be for the defendant: and, also—that if the boy, Royal, was born after the date of the said will, and the jury believed the defendant had purchased him at the sheriff's sale, and that the said Rowsee had given up the boy to be sold under the execution, the plaintiffs could not recover."

It is earnestly insisted, that the jury ought to have been allowed to presume the assent of Rowsee, as the administrator, to the taking and holding of the slaves by the plaintiffs as their own property; after which, he certainly had no right to reclaim. And the jury ought, also, to have been allowed to presume an extinguishment of the claims of the other parties, in any they had. But nothing was left to the jury—not even the question of the identity of the slave sold by the sheriff, and that sued for by the plaintiffs.

But this petition is too long. Perhaps it might have been sufficient to have said, that the court had not distinguished between the plaintiffs' and defendant's evidence in the statement of the case on which the instructions of the circuit court were predicated. This, it is respectfully suggested, opens the error which has occurred. The re-hearing is moved under a sense of duty the counsel feels to do all in his power to obtain a decision of his client's case according to the laws of the land.

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87

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1 Assumpsit is maintainable at common law, for the use and occupation of lands or tenements, although no express contract or promise, a promise to pay being implied. *Logan vs Lewis*,

6

2 Assumpsit for money paid &c. only maintainable when the consideration is money, not property, and is supported when plaintiff pays a debt due by defendant, to plaintiff's debtor, by cancelment of both debts, without the money actually passing and repassing. *Greathouse vs Throckmorton*,

18

3 No answer to action for money paid by plaintiff to defendant's use, that plaintiff had won the money from the person paid. The responsibility of defendant grows out of his being discharged from his debt by plaintiff, and at his request. *Id.*

19

4 To authorize a recovery on an *insimul compulsassent* count, it is not necessary that each item of plaintiff's account be proved, provided it is proved that the parties accounted together, and defendant acknowledged that a sum certain was due the plaintiff. *Crowdus vs Hutchings*,

44

5 Action for money paid, laid out and expended for the use of the defendant, will not lie unless the plaintiff has actually advanced money. *Madison's Executor vs Wallace's Executor*,

106

6 An action for money had and received, must be supported by proof that the defendant has ac-



- tually received money to the plaintiff's use. *Ib.* 100
- 7 But there are cases where money is considered as received or advanced when it is not actually done. *Ib.* 100
- 8 Where a person takes possession, uses and occupies land, as tenant under another, the common law raises an *assumpsit* to pay for the use and occupation. *Crouch vs Brides,* 257
- 9 The action for use and occupation is of *common law*, and not of statutory origin. *Ib.* 259
- 10 Vendor who has conveyed or covenanted to convey land, may maintain *assumpsit* for the purchase money. Statute of frauds and perjuries does not apply to the promise to pay the consideration, but to the contract for value of land. *Lewis vs Grimes,* 336
- 11 *Quantum meruit* for services evidence of what A charges, not competent; for what qualified persons can be procured to perform them, the inquiry. *French vs Frazier's Administrator,* 429

## Attachment.

See *Lis Pendens*, 1.

## Attorneys for Commonwealth.

See Fines and Forfeitures.

## Auditor.

- 1 Auditor must write down the statements of the witnesses that may be sworn before him, and report to the court the statements of the witnesses, and not his conclusions drawn from them. *Garner vs Beatty—and—Same vs Catron,* 226

- 2 Auditor required to report to the court all the testimony heard by him, or presented to him. *Dorsey's Representatives vs Dorsey,* 160
- 3 When case is reversed, the auditor's report is subject to objection and may be set aside the reversal not based upon defective report. *Haden vs Haden's Heirs,* 178

## Award.

See Arbitration and Award.

## Bail.

- 1 On petition and summons, the defendant cannot be compelled to give special bail. *Withers vs Cud &c.* 253
- 2 *Scire facias* against bail, cannot be maintained until after a *ca. sa.* and that having been abolished, there is now no remedy against bail. *Palmer vs McCrewwether,* 506

## Bank of Commonwealth.

- 1 The Bank of Commonwealth recognized to be consistent with the constitution of the United States, in conformity with previous decisions. *Briscoe &c. vs Bank of Commonwealth,* 349

## Bastardy.

- 1 Right of the mother, under the act of 1795, to compel the father to maintain his bastard child, is a civil right and remedy is a civil remedy. *Burgen vs Straughan* 584
- 2 Proceeding is not in nature of a criminal or public prosecution for a public wrong. *Ib.* 584

3 Nor is there any thing in the proceeding that should be deemed penal. *Ib.* 584

4 Agreement by mother of a bastard child, with the father, that if he will contribute to the maintenance of their child, she will not proceed against him under the bastardy act, is not unlawful, immoral, or inconsistent with the policy of the law. *Ib.* 581

5 Has county court or any of its officers, *ex officio*, a right, under the common law or the statute of Elizabeth, to institute any proceeding to compel the father of a bastard child to maintain it, if it would otherwise become a charge on the county. *Ib.* 585

6 Bastardy act of 1795 does not give the county court, nor any of its officers, a right, *ex officio*, to institute any proceedings in order to compel father to maintain his bastard child, but rests the sole power of originating such proceeding in the mother. *Ib.* 585

7 If the father of a bastard child agree with the mother to contribute to the maintenance of the child, and in consideration thereof the mother agrees not to prosecute him for its maintenance, under the act of 1795, the agreement will be enforced against him. *Ib.* 585

### Bill, dismissal of.

1 When a bill is dismissed for want of necessary parties, the dismissal should be 'without prejudice,' and an absolute dismissal on such ground, is error. *Fogge vs Richardson &c.* 240

2 Dismissing a bill, after dissolution of injunction, does not preclude complainant from maintaining his action at law, for the demand, set up in the bill ;

it is no litigation or determination of the rights of the parties. *Cavanaugh vs Davis,* 371

### Bill of Sale.

See Parol Evidence, 3.

### Bonds.

1 Bond for the prison rules, taken by a jailor, from a debtor confined by a *ca. sa.* which issued from the office of the federal court, decided to be void. *Moore vs Allen &c.* 651

2 See Interlineation.

3 See Condition.

### Ca. Sa.

See Bail, 2.

### Certificates of Settlement.

See Settlement, certificate of.

### Challenge.

1 On an indictment against a tavern keeper for permitting unlawful gaming in his house, the Commonwealth has no right of peremptory challenge to venire men. *Com'lt'h vs Bailey,* 248

### Chancellor.

See Mistake, 1.

### Chancery Jurisdiction.

1 See Lien.

2 See Jurisdiction.

3 See Contract, 1.

## Chancery Practice.

- 1 Answers denying allegations of bill, though they contain equity, yet bill must be dismissed, unless there be adequate proof. *Duglass vs Holbert*, 2
- 2 Rule of chancery practice, neither to permit several complainants to demand, by one bill, several matters perfectly distinct and unconnected, against one defendant, nor one complainant to demand several matters of distinct natures against several defendants. *Turpin vs. Turpin*, 37
- 3 When joint decree has been rendered against absent defendants, to open the decree on the answers of part of the defendants being filed, is error. *Bradley vs Cattel's Heirs*, 122
- 4 Injunction proper when bill filed, upon dissolution erroneous to decree ten per cent. damages. *Noland vs Pope et al.* 137
- 5 Bill for exhibition of title, title shewn not in the party to sale, but his wife, title accepted, complainant only liable to costs accruing after the acceptance of the title. *Ib.* 138
- 6 Cause remanded to enable complainant to withdraw demurrer and answer. *Grundy vs Edwards*, 369
- 7 Chancellor will not subject defendant's estate in Kentucky to the satisfaction of judgments of another State, upon mere allegation of existence of such judgments unsatisfied; if judgment debtor complainant, he might be subjected to conditions before relief granted. *Napier et ux. vs Davis*, 298
- 8 If party fail to answer bill of revivor vs. A B, as administrator of a decedent to original bill, and A B answers as administrator, the fact must be considered as admitted by him failing to answer. *Sprague vs Sprague &c.* 331
- 9 Congenial with chancery practice to amalgamate suits, when the cause of action is joint, and the parties interested are thus brought before the court. *Taylor's Heirs vs Watkins &c.* 364
- 10 In chancery causes, the record should shew every thing necessary to sustain the decree.—*Smith's Executor vs Bryant's Executor*, 374
- 11 None but party injured can complain. *Nelson's Heirs vs Boyce &c.* 406
- 12 If complainant have an interest in the subject matter of his bill through other persons, necessary parties; error to dismiss bill absolutely. *Peeble's Heirs vs Estill et al.* 409
- 13 Heir, liable upon warranty of ancestor, has a right, by bill *quia timet*, to ask the interposition of chancellor, to prevent sale of land, by which his responsibility would be consummated. *Ib.* 409
- 14 Question tried at law will not be re-examined in equity unless upon allegation of fraud in obtaining judgment at law.—*Triplett &c. vs Gill &c* 436
- 15 Party who does not shew title to land, cannot claim restitution, rents, or damages for waste. *Ib.* 437
- 16 Decree cannot be sustained unless facts necessary to uphold it appear in the record, recital in the decree insufficient. *Ib.* 438
- 17 Where a creditor has endeavored to obtain a fraudulent preference over the other creditors of an insolvent debtor, by having procured a conveyance

to himself of all the debtor's property, and the other creditors have obtained a decree setting it aside as null and void, his claims should be postponed till the other creditors are satisfied. *While vs Graves*,

526

18 Judgment at law a bar to re-investigation of same matter in chancery, unless defective proceedings. *Hickman &c. vs McCurdy*,

557

19 If complainant fail to answer a fact charged by defendant, and which defendant calls upon him to answer, the allegation must be taken as true. *Mason et al. vs Peck*,

300

20 Deposition of one interested in the event of the suit, inadmissible. *Ib.*

301

21 One witness not sufficient to establish notice of prior equity against the positive denial of the answer. *Ib.*

301

22 Sufficient grounds to refuse specific execution of contract to convey land, that party against whom relief is demanded, had no title. *Ib.*

301

23 See Bill, dismissal of.

## Chose in Action.

1 Chancellor has no jurisdiction over the choses in action of a debtor, nor to restrain him in the sale of his property until complainant has obtained his judgment, and had executions returned nulla bona. *Wooley vs Stone*,

302

## Clerk.

See Deputy Clerk.

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## Co-Heirs.

See Co-Obligors, 1.

## Collector of County Levy.

See County Levy, 1.

## Commissioner, deed of.

See Deeds.

## Commissioner's Report.

See Decree, 2.

## Common Counts.

See Parol Evidence, 7.

## Commonwealth Bank Paper.

1 Appellate court will judicially take notice of the fact that commonwealth bank notes are not equal in value to their nominal amount; but it will not judicially notice the rate or degree of depreciation. *Neal vs Durrell*, 105

2 In a suit on a contract for commonwealth's bank notes, a judgment rendered in specie for the full amount of the contract and interest thereon, will be reversed. But if the judgment be, in the least degree, less than the full amount of contract and interest thereon, it will not be reversed, because the court will not judicially notice the degrees of depreciation. *Ib.*

105

## Condition.

1 A nonsensical or repugnant condition will not affect an obliga-

tion, even though the entire condition be incongruous or uncertain: *a fortiori*, an uncertain or repugnant stipulation or expression in a condition, which is consistent and certain in other respects, will not change the import of the contract. If the condition of a bond be, that, "if the obligor do not pay, the bond shall be void," the obligation will be understood to be single, or as if there had been no condition: for when the condition recites a debt, and after, lays an obligation not to pay it, it is in that repugnant and void.—*Stockton vs Turner*,

192

### Congress.

1 Congress cannot delegate its own legislative powers to the state legislature, or adopt, prospectively, such laws as a state may thereafter pass upon any particular subject. *Moore vs Allen &c.*

652

2 The power of members of Congress is a personal trust, which cannot be delegated. *Ib.*

652

### Consideration.

1 If a person, who is indicted for a crime, employ a lawyer, and execute his note for the amount of the fee, and then, before his trial, commit suicide, the fact that lawyer did not perform the principal service for which the note was executed, (to wit, the defence of the criminal on his trial) is no ground for impeachment of consideration of the note either at law or in equity, because the non-performance resulted from act of obligor himself. *Mitcherson et al. vs Dosier*,

54

2 When promissory note recites two considerations, for promise therein contained, and either of

them be inconsistent with law, morality, or public policy, the whole note is vicious and void. *Burgen vs Straghan*,

583

3 Past cohabitation, or an obligation to contribute to support one's own bastard child, are either of them legal and valid considerations sufficient to uphold a promissory note. *Ib.*

583

4 See jurisdiction.

5 See Pleas and Pleading, 2.

6 See Covenant, 2.

### Constable.

1 Constable a ministerial, not a judicial officer; his duty to obey the execution, not to decide on its validity. *Commonwealth vs O'Call*,

150

2 In a declaration against a constable, a simple allegation "that he failed to make a true and correct return on an execution," is insufficient to render him liable for a false return *Commonwealth vs Bartlett's Executor*,

162

3 To render a constable liable for a false return, the declaration should state the nature of the return made, and then charge its falsity, and shew the injury resulting. *Ib.*

163

4 Neither sheriffs nor constables are bound to go out of their counties to pay over money collected on executions. *Ib.*

162

5 Before a sheriff or constable is liable to be sued for money collected by him on an execution, where the creditor resides in another county, a special demand, and refusal by him to pay, are essential prerequisites. *Ib.*

162

3 In a declaration upon a constable's bond for a failure to pay over money collected upon an execution, it is necessary to aver a *special demand*, and the averment of *sape requisitus* is insufficient, unless the declaration shews on its face that the plaintiffs are residents of the county, or had a known agent therein, or unless such be the legal inference. *B.*

163

7 See Execution, 11.

### Continuance.

1 If a defendant withdraw his pleas, the refusal of the circuit court to continue the cause will not be considered by the appellate court. *Arnold vs Trundle,*

116

### Contract.

1 Contract made with a widow immediately after death of her husband, while his body lay an unburied corpse in her presence, and under circumstances of violence calculated to intimidate her to its execution, and by which, for a small consideration, she relinquishes a considerable legacy to which she was entitled by her husband's will, decided to be *unreasonable*, and therefore cancelable by the chancellor. *Falsey Stewart vs Stewart,*

187

2 Contract to pay a person for his services in the management of a petition to the Governor for remission of a forfeiture, *provided he shall procure a remission of it*, will not be enforced, because such contracts tend to obstruct a correct administration of the government. *McGill's Administrator vs Burnett,*

840 See Evidence, 6, 9.

### Contribution.

1 A B & C borrow money jointly, but appropriate individually unequal sums. The benefit to each is according to the amount appropriated by each. In event of the insolvency of either, the loss should be sustained by the solvent partners in the proportion of the sum employed by each for his own use. *Kincaid vs Hocker,*

333

2 See Surety,

### Conveyances.

1 See Land, conveyances of, 1.

2 See Dower, relinquishment of, 1, 2.

3 See Voluntary Conveyances:

### Co-Obligors.

1 Judgment in favor of one heir or co-obligor, which will bar any other suit against him for the same cause of action, will extinguish the obligation of his co-heirs or co-obligors, unless the judgment has been obtained by a defence, which applies peculiarly and alone to the party in whose favor it has been rendered. *Hunt vs Terrill's Heirs,*

68

2 Imprisonment of one obligor does not operate as exoneration of himself or co-obligor, without actual satisfaction and release. *Scott et al, vs Colmesnil,*

417

### Copy.

840 See Evidence, 6, 9.

## Ceram Nobis, writ of error.

- 1 In a writ of error *ceram nobis*, to unite errors of fact and law, is error. *Logan vs Steel's Heirs*, 42

## Corporations.

- 1 It is a general rule that the contracts of a corporation must be authenticated by its common seal. *Garrison et al. vs. Combs*, 85
- 1 A corporation may appoint an agent, and be bound by his acts. *Ib.* 86
- 3 A corporation may assign a note by an entry to that effect in its registry. *Ib.* 88
- 4 To pass from a corporation its interest in a promissory note, it is not indispensable that the corporate seal should be affixed to the assignment. *Ib.* 88

## Costs.

- 1 When part of appellants compromise pending an appeal, and pray a dismissal, the court will only give costs, upon reversal, to such as pursue the appeal, notwithstanding the reversal be as to all. *Nelson's Heirs vs Clay's Heirs*, 143
- 2 Costs given against those only who were already benefitted by the decree reversed. No costs for or against those whose condition was doubtful. *Taylor's Heirs &c. vs Watkins &c.* 366
- 3 See Chancery Practice, 5.

## Co-Surety.

See Security.

## County Court.

See County Levy.

## County Levy.

- 1 County court cannot (even as relator) maintain an action against the collector of the county levy on his official bond. *Commonwealth vs Mckarland*, 206
- 2 On a motion, by a sheriff against his deputy, or the sureties of his deputy, for a failure to collect, pay, or account for county levy, there should be proof that there was a levy laid, and that the clerk delivered to the deputy a list of the persons chargeable therewith, and also that the deputy collected, or undertook, or was bound to collect the levy. *Anderson &c. vs Bradford's Administrators*, 623
- 3 County court has no jurisdiction of a motion made by a sheriff against his deputy, or the sureties of his deputy, for a failure to collect, or pay, or account for county levy. *Ib.* 624

Co. ct. has jurisdiction of a motion made by a collector of the county levy (who has been appointed by itself,) against his deputy, and the sureties of his deputy, for a failure to collect or account for county levy. *Ib.* 624

## Court of Appeals, opinion of.

See Opinion of Court of Appeals, 1.

## Covenant.

- 1 The words "all necessary apparatus," mean all such articles as are usually employed in the business referred to. *Patterson et al. vs Garrett*, 113

- 2 If two covenants be delivered at the same time, and are constituent parts of the *res gesta*, one consideration sustains both, nor is one merged in the other, when consistent and not contradictory. *Jones vs Waggoner's Administrator*, 145
- 3 Covenant to refund upon eviction by paramount title, covenantor has notice of pendency of ejectment and eviction by title superior to his, he is liable to damages. *Ib.* 145
- 4 In an action by an executor on a covenant to convey land, the declaration must shew that the breach took place in the lifetime of the covenantor. *Ashby's Executors vs Moor's Administrator*, 164
- 5 For a breach of covenant of warranty in a deed of conveyance, the right of action is in the heir, if the eviction happens after the death of the covenantor. *Ib.* 164
- 6 When an administrator sues for a breach of covenant of warranty, contained in a deed of conveyance of land to his intestate, the declaration must allege that the eviction took place in the lifetime of his intestate. *Ib.* 164
- 7 When the covenant is to pay (a certain sum) in annual instalments, decided that the whole sum to be paid should be divided into two equal instalments, payable in one and two years from date of the covenant. *Turner vs Roby's Executor*, 211
- 8 Nor will interest accrue on either of such instalments until they become due and payable. *Ib.* 211
- 9 Covenant "to keep the farm and buildings in good repair, and leave them in the same good order at the end of said term of three years," does not bind the tenant either to put or leave the premises in better repair than they were at date of the covenant. *West vs Hart*, 258
- 10 Covenant to pay \$210 on a note of covenantor for \$325, in the hand of a third person, not discharged by the payment of \$300 in the purchase of covenantor's property, mortgaged to secure the \$325, long after the payment ought to have been made, according to the tenor and effect of the covenant, and the note for \$320 had been merged in a judgment against the drawer of the note. Purchase of the mortgaged property by covenantor, and payment of \$300 for it, was no more a performance of the covenant than if done by a stranger. *Railey vs Jones*, 305
- 11 The words, "should I not pay said sum of money by the 20th inst." in an instrument, specifying the subscriber had "borrowed" the money, constitute an express covenant to refund the money. *Hart vs Burton*, 324
- 12 Any words which evince an agreement will constitute an express covenant when inserted in a specialty. *Ib.* 324
- 13 "Borrowed" imports an obligation to return the thing borrowed, or its value. *Ib.* 324
- 14 Implied covenants are legal inferences from technical terms, applied to real estate; & a covenant, which words import, according to their ordinary signification and grammatical use, is an express covenant. *Ib.* 325
- 15 Covenant to indemnify against preexisting liability to suit, not broken, unless covenantor be sued, or actually pay the whole or some part of the debt. *Bryan vs Buford*, 335



16 Covenant not to carry on a trade in a particular town or county, valid. Damages given at law for breach, and specific performance denied in chancery to one who has violated it.—  
*Grundy vs Edwards*,

369

17 Covenant that grantor has "right and lawful authority to sell and convey," is not covenant of "seisin," nor was it prior to July, 1824, incompatible with adversary possession; it only imports vestiture of legal title, and right to convey it. *Triplitt &c. vs Gill &c.*

435

18 Court will not presume that parties did not understand their covenants according to their plain import. *lb.*

436

### Covenant, action of.

1 Endorsement on a note, of payment by plaintiff in an action of covenant where the defendant's liability depends on the fact of plaintiff's having paid, not evidence, unless its genuineness be proved. *Bryan vs Buford*,

335

2 The sum paid or agreed to be paid, is the measure of damages for breach of covenant in consideration thereof. *Grundy vs Edwards*,

367

3 Plaintiff never evicted, no answer to claim for damages upon breach of covenant, that defendant had "right and lawful authority to sell and convey." *Triplitt &c. vs Gill &c.*

439

4 Criterion of damages for breach of covenant of title, the consideration actually paid, and interest. *lb.*

440

### Creditors, postponement of.

See Chancery Practice, 17.

### Crimes.

1 The rule, as laid down by Sir William Blackstone, that the law will not "suffer any crime to be prevented by death, unless the same, if committed, would be punished by death," is incorrect. *Gray vs Combs*,

486

2 In most civilized countries, the authorized extent of resistance in the necessary defence of the person or property against the perpetration of crimes must greatly exceed the amount of punishment prescribed by law for their perpetration. *lb.*

490

### Cross-Bill.

See Answer.

### Damages.

1 When bill asks an injunction against part of a judgment only, to give, on dissolution of the injunction, ten per cent. damages on the whole amount of the judgment, is error.—  
*Mitcherson et al. vs Dorier*,

55

2 When defendant, in his answer, waives his right to damages on dissolution of injunction, there should be no decree for damages on the dissolution of the injunction. *lb.*

55

3 Criterion of damages for breach of warranty of title to slave, the sum paid, and legal interest from the time defendant charged with damages for detention. *Ellis vs Gorney's Heirs*

110

4 Damages should be allowed upon the sum for which an injunction is dissolved. *Harrison vs Lee &c.*

172

5 See Chancery Practice, 4.

## Debit and Credit.

- 1 Not improper when an account is closed by note, to debit the payee with the amount of the note, and when the note is paid, to credit him by the payments. *Waggoner vs Minter et al.* 174

## De Bonis Non, administrator.

- 1 See Administrator.
- 2 See Assets.

## Debt, action of.

- See Endorsement, 2.

## Declaration.

- 1 Declaration, substantially setting forth covenant and breach, so as to show cause of action, good. *Triplett &c. vs Gill &c.* 438
- 2 See Heirs.
- 3 See Constable, 2, 3, 6.
- 4 See Covenant, 1, 3.

## Decree.

- 1 The evidence to sustain a decree must appear upon the record. *Garner vs Bealy—and—Same vs Catron,* 225
- 2 This court cannot revise the proceedings of an inferior tribunal so as to come to any satisfactory conclusion, unless the foundation upon which the decree of the inferior tribunal rests, is made to appear. *Ib.* 225

- 3 Decree for the specific sums of money in the bill mentioned, and for a partition of land, appoints commissioners to make the partition of the land, and directs them to report at next term of the court, decided, that such decree is final. *Talbot vs Todd,* 459

- 2 If the commissioners make an erroneous report, it may be quashed: but if they properly execute the decree, their partition is not subject to correction by the court. *Ib.* 459

## Deed.

- 1 Provision for after-born children may be made either by deed or will. *Arbuckle vs Harden &c.* 97
- 2 If a deed be not enrolled within eight months from its execution, it is not competent evidence, unless its execution be proved. *Lessee of Speed &c. vs Brooks,* 120
- 3 Deed executed in 1800, by agent: in 1817, the principal acknowledges the deed as his act and deed before the clerk. This acknowledgment must have relation to the original execution of the deed, and cannot operate as a new delivery or second execution of the deed. *Ib.* 120
- 4 Deed of gift of slave, when possession does not accompany the deed, will not pass title even from donor to donee, unless the deed be actually recorded within eight months from its date. *Pyle vs Maulding,* 204
- 5 According to the settled interpretation, in England, of the statute of H. 8, which requires deeds of bargain and sale to be recorded, a deed of bargain and sale does not pass the title even

from bargainor to bargainee, unless the deed be recorded within the time prescribed by that statute. *Ib.*

6 If a deed of gift of slaves be recorded within eight calendar months, it is sufficient. *Ib.*

7 In computing the eight months, the time within which a deed of gift of slaves is required to be recorded, the date of the deed must be excluded. *Ib.*

8 To record a deed on the testimony of one witness, in cases where the law requires the attestation of two witnesses, is a nugatory act. *Ib.*

9 Deed made by a commissioner conveying the title of non-resident heirs to land, is not void, although the decree under which it was made, did not allow the heirs time to make the deed in their own proper persons. *Nesbit vs Gregory,*

10 A statutory deed is ineffectual, unless made in the manner prescribed by the statute. *Ib.*

11 A deed made by commissioners, appointed by a county ct., is a statutory deed. *Ib.*

12 Deed made by a commissioner, under a decree, is valid, whether he subscribe to it his own name, as commissioner, or that of the person whose title he conveys. *Ib.*

13 Stipulation, in conveyance, to indemnify against responsibility afterwards to be incurred, valid, and creates lien on property conveyed. *Nelson's Heirs vs Boyce &c.*

14 See Evidence, 6.

15 See Voluntary Conveyances.

## Deed of Trust.

See Trusts, 1.

## Defence of Person and Property.

1 See Crimes, 1, 2.

2 See Spring-Gun.

3 See Self-Defence.

## Demurrer to Evidence.

1 On a demurrer to evidence, a judgment in favor of the demurrant, is a bar to any future suit on the same cause of action. *Hunt vs Terrell's Heirs,*

1 If a plaintiff desire to avoid the effect of a judgment on a demurrer to evidence, he should not join the demurrer, but should waive his evidence, and then a non-suit would be the only consequence. *Ib.*

3 See Judgment, 2.

## Deputy Clerk.

1 Deputy clerk has a right to subscribe the name of his principal. *Triplett &c. vs Gill &c.*

## Descent.

1 By the statutes of Tennessee, brothers and sisters of half blood, take equally with those of the full blood of deceased brother's or sister's estate, whether real or personal. *Napier et al. vs Davis &c.*

**Detinue.**

- 1 Plaintiff in detinue is estopped from recovery by an executory agreement to release the property sued for. *Franklin, Administrator vs Hart,* 339
- 2 Executory contract may vest such title in the thing contracted for, as will maintain an action of detinue. *Ib.* 339
- 3 After slaves, recovered in action of detinue, have been surrendered in pursuance of the judgment, there is no remedy to recover for the detention of them between the date of the judgment and the surrender of them in pursuance of the judgment. *Moor's Trustees vs Howe's Heirs,* 65
- 4 If plaintiff in detinue elect to take the assessed value of slave and damages for detention, defendant is to be considered owner of slave, and the judgment to be treated as a judgment for money. *Ellis vs Gosney's Heirs,* 111
- 5 Error to decree compensation for the detention of a slave after judgment in detinue. *Ib.* 110

**Devise.**

- 1 From the Norman conquest to the reign of H. VIII. land was not devisable, except in particular places where custom authorized it. *Walton's Heirs vs Walton's Executrix et al.* 58
- 2 A statute of H. VIII. authorized persons having title to land, to dispose of two thirds thereof by will. *Ib.* 58
- 3 By our statute a person may dispose, by will, of all interests which he may have in land at his death. *Ib.* 59

- 4 Under the statute of H. VIII. a person could dispose of no more land by his will than he had title to at the date of the will. *Ib.* 59
- 5 English doctrine was, that, as to land, a will spoke at its date, but as to personalty, it spoke at testator's death. *Ib.* 59
- 6 In England, an express devise of land which should be thereafter acquired, would not pass land acquired after the date of the will. *Ib.* 59
- 7 In this country, land acquired after the publication of the will, may be made to pass by it. *Ib.* 59
- 8 Whether land acquired after the publication of a will, shall pass by it, is a question of intention to be solved by a proper construction of the whole will. *Ib.* 59
- 9 If, from the will itself, it appears more reasonable to infer an intention that after-acquired land should pass by it, than that it should remain undevise'd, then it shall pass by the will; otherwise, if the contrary intention shall appear more reasonable, the land shall descend. *Ib.* 60
- 10 Since act of 1800, which makes slaves real estate, a person under 21 years of age cannot devise a slave. *Ib.* 60
- 11 Since act of 1800, which makes slaves real estate, a will that would not pass land, will not pass a slave. *Ib.* 60
- 12 Since act of 1800, a devisee of a slave takes under the will in the first instance, just as a devisee of land takes and holds land devised. *Ib.* 60
- 13 Notwithstanding the act of 1800 has made slaves real estate, a general devise of slaves

will pass all those which the testator has at his death. *Id.*

14 General devise of slaves will be considered as speaking at the death of the testator, notwithstanding the act of 1800 makes slaves real estate. *Id.*

15 Devise, by husband to wife, of property, real and personal, requiring her with child, forfeited upon the marriage of the widow, and property is deemed to pass to the heirs of the decedent, though by limitation over of negroes or personal property. *Napier et al. vs Davis &c.*

16 If estate devised same with that which devise would take as heir, the estate passes by descent, not by purchase. *Griffith vs Huston &c.*

17 Devise of "future increase" does not pass any child born prior to the date of the will. *Fightmaster &c. vs Beasley,*

### Devises.

See Abatement.

### Devises, action against.

1 Surety who has paid debt of his principal, and afterwards not indemnified in payment against his executor and had a *&c.* returned "no property found" may maintain an action against the devisees. *Buckner's Devises vs Morris,*

### Dismissal of Suit.

See Practice.

### Disseizin.

1 Disseizin is the wrongful ouster

of the rightful tenant, and an usurpation of the freehold. 396

2 Extent of a disseizin, the actual occupancy of disseizinor by inclosure. *Griffith vs Huston &c.* 350

### Distress.

1 Statutes of 1815 and 1820, which exempt certain property from distress, have not been repealed by the execution law of 1828. *Branson vs Bacon et al.* 280

### Distributees.

See Distribution.

### Distribution.

1 If distribution made upon equitable principles by county court commissioners, and which is concurred in by the parties to the distribution, though a party may have waived a legal right, his heirs will not be permitted to disturb such distribution, no fraud or imposition being established. *Haden vs Haden's heirs,* 163

2 If some of distributees account for advancements, as between such the whole estate of slaves and chattels to be distributed share and share alike. *Id.* 170

3 The slave fund and the chattels proper, constitute distinct classes, and to be apportioned according to the advancements in each. *Id.* 170

4 He who refuses to enter into a bond is entitled to no distributive share; nor is he who waives his right upon partial distribution, to have slaves then distributed afterwards. *Id.* 170

5 Personal representative of administrator of decedent should

be partly to writ for distribution of decedent's estate. *Ib.*

171

### 3 See Judicial Knowledge.

## Dower.

See Slaves.

### Dower, assignment of.

1 When the order appointing commissioners to assign dower does not appear in the record, but the bill of exceptions acknowledges that such an order was made, and does not question its legality, it will be taken to have been such an order as the law requires. *Taylor vs Lusk,*

637

2 That the mansion house is not allotted to the widow is insufficient ground for quashal of report of commissioners, making an assignment of dower. *Ib.*

638

3 If widow gets an equal third part, in value, of the land, it is all of the land which the law gives her, and she cannot complain, no matter where it may be laid off to her. Law gives her no preference over the heirs or devisees. *Ib.*

638

4 When the personal representative refuses to consent to an assignment of dower out of slaves, the county court should not assign to the widow her dower in the slaves. *Ib.*

638

5 In such case, her remedy is in chancery. *Ib.*

638

6 When executor or administrator consents to the assignment of dower in the slaves, the county court may cause the assignment to be made. *Ib.*

638

7 In assignment of dower in slaves,

an allowance of a sum of money to the widow, to make her share of the slaves equal a full third, is not error. *Ib.*

639

8 Husband died in April, and dower was assigned to widow in June ensuing, but the report of the commissioners, making the assignment, postponed her in the enjoyment of her dower until the end of the year. decided not to be error, because she is indemnified by her distributive share of the crop. *Ib.*

640

### Dower, relinquishment of.

1 When justices of another county than that in which the land lies, certify a conveyance of it by husband and a relinquishment of her dower therein by the wife, the certificate must shew that husband not only acknowledged the conveyance, but subscribed it in the presence of the justices, otherwise the wife is not divested of her dower in the land. *Kay vs Jones,*

40

2 No statute which prescribes any mode for relinquishment of dower, during life of husband, unless he, by concurring in a conveyance, divest himself (or has previously divested himself) of his fee. *Ib.*

40

## Ejectment.

1 After a judgment in ejectment has, as evidenced by the official return on a *habere facias*, been fully executed by evicting the tenant in possession, and giving actual possession to the plaintiff, it is error to award an *alias habere facias*. *Dent vs Simmons,*

42

2 Ejectment cannot be maintained against one who entered legally, and has done no act by

which his possession has become wrongful. It can only be maintained against a trespasser or quasi trespasser. *Harle vs McCoy*,

320

2 Bond for title competent evidence in ejectment by vendor or vendee, to show the nature of vendee's possession. *Ib.*

320

3 Husband can recover in ejectment land belonging to the wife, without joining her in demise. *Griffith vs Huston*,

386

4 Conduct of plaintiff in ejectment may operate an abandonment of his possession of an interference. *Smith vs Morrow*,

443

### Endorsement.

1 Endorsement by A B, that he holds himself bound for promisor in note, as security, for a part of the sum stipulated to be paid, is to be taken as an original undertaking for the amount specified by the endorsement, and a direct obligation to the holder is incurred to pay that sum when the note becomes due, whether the drawer be solvent or insolvent. *Richardson vs Flournoy*,

155

2 In such case debt is the proper action, and interest to be allowed from the time the debt becomes due. *Ib.*

156

3 See Action, 3.

4 See Pleas and Pleading, 10.

### Entry.

1 Case of entry, to run up a creek certain distance the general course of the creek, for a base, a straight line from the beginning to a point on the creek, the distance called, not a line parallel to the creek, is the base. *Taylor's heirs &c. vs Watkins &c.*

365

2 When there is doubt in the calls of an entry, but not sufficient to destroy it, the construction most unfavorable to claimants must be adopted. *Ib.*

365

3 Entry materially amended, takes date from amendment. *Underwood &c. vs Crutcher*,

531

3 See Forcible Entry and Detainer.

### Entry, right of.

1 At common law, entry tolled by descent cast; but by statute, [Dg. 467, not tolled unless five years' possession by disseizor next after disseizin, without entry or continual claim by person having title. No saving in statute, otherwise, at common law. *Griffith vs Huston &c.*

383

2 Husband and wife have right of entry into lands in right of wife of which they have been disseized, descent casts takes right of husband. *Ib.*

388

3 Disability of one parcener does not waive right of entry to such as labored under no disability when the right accrued. *Ib.*

388

4 Judgment in ejectment gives plaintiff therein no right of entry on land in the possession of a person who is neither party nor privy to the judgment. *Kercheval vs Ambler*,

622

5 See Forcible Entry and Detainer.

### Equity.

See Lien.

### Equity of Redemption.

1 When an officer levies on the

mortgagor's equity of redemption in mortgaged property, he has the right to take the property into his possession for the purpose of effecting the sale. *Phillips vs Morris*, 280

### Error.

- 1 Error to admit evidence which has no bearing on, or relevancy to the matter in contest. *Scott et al. vs Colmumil*, 421

### Error, assignment of.

- 1 Assignment of error in general terms "that the court below erred in dismissing complainant's bill" decided to embrace an error committed in the manner of the dismissal of the bill. *Pogue vs Richardson &c.* 240
- 2 This court will, to reach the justice of the case, give liberal constructions to assignments of error. *Ib.* 240

### Escrow.

- 1 Obligation cannot be an escrow after its delivery to obligee. *Wood et al. vs Kendall et al.* 216

### Estoppel.

- 1 Person is not estopped by return on a writ to which he is not a party, but is estopped by express acknowledgment in his covenant, unless it be shown to have been procured by fraud. *Norton vs Sanders*, 13
- 2 Party estopped from denying eviction, if expressly acknowledged in covenant, to hold under plaintiff in *habere facias*. Unless fraud or duress, he cannot resist restitution by proving the eviction to have been illegal. *Ib.* 14

- 3 Written acknowledgment that party claiming as landlord, has been put "in complete and perfect possession of the land by the sheriff," and that party charged as tenant, "considers himself tenant of such landlord is not an acknowledgment of eviction; nor does it stop the occupant from contesting the right of such claimant of the land; and parol testimony admissible to prove no actual eviction, and the prior possession and its character. *Ib.* 14

- 4 In an action on injunction bond, decided that the parties are estopped by the bond, to deny that there is such a judgment as that which the bond describes, or to show any other judgment than that thus described. *Stockton vs Turner*, 192

- 5 He who enters upon land under the title of another is estopped to deny such title. *Harle vs McCoy*, 318

- 6 Acknowledgment in deed of consideration paid, does not conclude party from showing that it has not been actually paid. *Triplett &c. vs Gill &c.* 441

- 7 Acknowledgment of consideration in deed no estoppel. True consideration may be proved by parol. *Hickman &c. vs McCurdy*, 592.

- 8 See Detinue, action of, 1

### Evidence.

- 1 When circuit court has rejected testimony which was inadmissible, unless it succeeded that of a witness introduced by the opposite party, and the record does not show at what time the rejected testimony was offered, the judgment will not be reversed because of the rejection of the testimony. *Crowdus vs Bulchings*, 44



- 2 Evidence of heirship obtained from those through whom title is attempted to be derived, is not admissible. *Lessee of Speed &c. vs Brooks*, 119
  - 3 The confession of one defendant, in an action of assault and battery, is not evidence against a co-defendant. *Sodusky vs McGee*, 267
  - 4 Irrelevant paper should be excluded from the jury. *Nesbit vs Gregory*, 272
  - 5 Evidence of conversion does not prove a contract to return. *Griffin vs Hendrick*, 280
  - 6 When the original deed is proved to be lost, and its execution is established by a subscribing witness, a copy sworn to have been made out by a clerk, as a true copy, is admissible to show title in the lessor of the plaintiff in ejectment. *Morgan's heirs vs Marshall*, 317
  - 7 Irrelevant evidence not admissible, but whatever conduces to show the claim sued on had been settled is relevant, and should go to the jury. *French vs Fraser's Administrator*, 430
  - 8 Administration granted, is *prima facie* evidence of intestate's death; if questioned, *onus* is upon assailant. *Ib.* 432
  - 9 Copy of will admitted as evidence, being the best that under the facts established could be had. *Triplitt &c vs Gill &c.* 439
  - 10 Grantor in a deed is competent to prove its execution, so far as his title and interest has passed by it, or in other words, so far as he was concerned in its execution. *Smith vs Morrow*, 444
  - 11 But one grantor is not competent to prove the execution of a deed by his co-grantors. *Ib.* 444
  - 12 When grantor acknowledges the execution of the deed or is ready and willing to be a witness to prove it, it is unnecessary to prove its execution by the subscribing witness. *Ib.* 445
  - 12 See Auditor.
  - 13 See Deed, 2.
  - 14 See Partners and Partnership.
  - 15 See Execution, 9.
  - 16 See Decrees.
  - 17 See Parol evidence.
  - 18 See Error.
- Exchange.**
- See Specific performance, 4.
- Execution.**
- 1 Execution upon sale bond in which sureties are co-obligors and co-obligees, erroneous if it issue against all the parties; it should issue only against the principal or such as are not both obligors and obligees. *Debard vs Crow*, 9
  - 2 When two executions in favor of different parties against the same person, shall be delivered to the officer at different times, it is his duty first to satisfy that which first came to his hands. *Commonwealth vs Stratton*, 91
  - 3 If an officer who holds an older and junior execution in his hands, shall levy the junior execution first, and by the satisfaction of it first, shall so exhaust the property that there shall not be sufficient to satisfy the older execution, and in consequence thereof the older execution is satisfied out of the estate of the surety of the defendant in the older execution, the officer is

- liable in a suit on his official bond, for the injury thereby inflicted on the surety in the older execution. *Ib.* 92
  - 4 If a sheriff, after he has levied on property, permit another officer to take it off (in satisfaction of other executions,) he violates his duty, and his official bond. *Ib.* 93
  - 5 The officer holding the *oldest* execution has no right to take property out of the hands of another officer who has made the first *levy*, although made in virtue of a younger execution. *Ib.* 93
  - 6 An execution issuing to a county in which the defendant does not reside, the provisions of the statute of 1827 not having been complied with, is irregular, but not void. The defendant in execution may avoid it, but until he does, it is obligatory, and an officer who may have received it, is liable to the penalties of the law if he fail to comply with its mandate. *Commonwealth vs O'Cull et al.* 149
  - 7 Constable a ministerial, not a judicial officer; his duty to obey the execution, not to decide on its validity. *Ib.* 150
  - 8 Plaintiff in execution responsible to defendant for enforcing irregular execution, on regular judgment, in like manner, as he would be for enforcing irregular judgment, by regular execution. *Ib.* 151
  - 9 Irregularity of execution may be given in evidence in mitigation of damages, but is no bar to an action for failing to obey its mandate. *Ib.* 152
  - 10 Plaintiff in execution is not liable for illegal levy of officer, unless he directed or was instrumental in the levy. *Hopkins vs Smith et al.* 264
  - 11 If the plaintiff in an execution has received his debt, either before or after the return of the execution, or if the execution has been satisfied by a sale of property to the plaintiff himself, he cannot thereafter recover, by motion, against the constable and his sureties, the amount of the execution and ten per cent. damages for a failure to return it within the time prescribed by law. *Sharp vs Trover et al.* 277
  - 12 The court refuse to order execution from their clerk's office, to enforce their judgment for damages, but remand the cause to the court below to be executed. *Talbot vs McQuiss,* 321
- Execution, sale under.**
- See Trover, 2, 3.
- Executor and Administrator.**
- 1 One of two joint executors may release a cause of action which belongs to the estate of his testator. *Brown's Executors vs Thompson's Administrators,* 587
  - 2 Although the will direct that executor be not required to give security, the county court may, if it suspect the executor of fraud, or apprehend that the assets will be insufficient for payment of testator's debts, require him to give security; and if executor refuse, or, on reasonable time allowed him, fail to give security, the court may, upon making these facts appear upon its record, grant administration *cum testamento annexo.* *Bronaugh vs Bronaugh,* 622
  - 3 See Heirs.
  - 4 See Covenant, 1, 2,

5 See Guardian and Ward.

6 See Revivor.

### Executory Contract.

1 See Vendor and Vendee, 2.

2 See Detinue, action of, 1, 2.

### Fee Bills.

1 In a suit against sheriff and his sureties for damages for his failure to account for fee bills delivered to him for collection, to render a judgment for ten per cent. interest on the damage assessed by the jury is error. *Arderly &c. vs Commonwealth*, 166

2 Statute which gives ten per cent. interest against the sheriff for failure to account for fee bills put into his hands for collection, is penal, and does not apply to or comprehend his sureties. *Ib.* 166

3 In a motion or proceeding against a sheriff or his deputy for a failure to account for fee bills put into his hands for collection, ten per cent. interest may be adjudged against him, but in a common law suit against his sureties on their bond, a greater sum than the damages assessed by a jury cannot be adjudged against them. *Ib.* 167

4 In a suit against sheriff and his sureties for a failure to account for fee bills put into his hands for collection, if the judgment should be joint, the ten per cent. interest on the amount of the fee bills, cannot, in such case, be adjudged even against the sheriff. *Ib.* 167

5 When a circuit judge quashes a fee bill of a clerk for illegal charges, his jurisdiction or power must be clearly shewn by the

record of the judgment. *Rodes vs Hays*, 591

6 The jurisdiction in such case is limited and local. *Ib.* 591

7 Nor can it be delegated, or waived, by the act of the clerk. *Ib.* 591

8 And, therefore, if the clerk appear and make no objection to the jurisdiction, a judge in any other county than that in which the applicant resides, could not enforce any judgment against him. *Ib.* 592

9 On a motion to quash illegal fee bill of a clerk, consent cannot give jurisdiction. *Ib.* 592

10 And an appearance by the clerk does not dispense with the proof of all the facts necessary to sustain the jurisdiction of the judge. *Ib.* 592

11 Where judgment has been rendered, quashing fee bill of a clerk, and he did not appear, the record ought to shew a case of which the court had jurisdiction. *Ib.* 592

### Felon.

See Process, service of, 1.

### Fines and Forfeitures.

1 The act of 1823 to suppress unlawful gaming allows the attorney, prosecuting any one to conviction, 25 per cent. on the sum collected, not on the sum recovered. It vests in the attorney no interest in the fine separate from that of the commonwealth, nor abrogates her constitutional power to remit. *Rout vs Feemster*, 132

2 Treason excepted, the power of the governor "to remit fines

and forfeitures, grant reprieves and pardons, is unlimited, illimitable and uncontrollable." *Ib.* 132

3 The act of 1823 directs that any person convicted under it, shall be imprisoned in jail until the fine is paid. *Ib.* 133

4 Prosecuting attorney has no right to give day, substituting his responsibility for the consummation of the law: any covenant taken by him from the person convicted, is void, a breach of his official duty, and recovery cannot be had on it. *Ib.* 133

5 After a fine has been paid over to the informer, his right is indefeasible, and a subsequent remission of the fine, by the Governor, will not give the person fined a right of action to recover back from the informer the amount of the fine so paid to him. *Rucker vs Bosworth,* 646

### Forcible Entry and Detainer.

1 Writ of forcible entry and detainer, only maintainable when occupant has entered under demandant in virtue of a lease. *Norton vs Sanders,* 14

2 Tenant may resist a warrant for forcible detainer at the instance of a landlord, under whose title he did not enter. *Ib.*

3 At common law a person holding the title to land and having the right to enter, might use actual force to effect his entry. British statutes of forcible entry and detainer have never been construed to destroy the common law right of justifying, in an action of trespass *quare clausum frigit*, a forcible entry, by pleading and proving a right of entry. *Tribble et al. vs Frame,* 601

4 Person having the legal title to land and being in actual possession. VOL. VII.

sion, has a right to repel by force, if necessary, any attempt to molest him in the enjoyment thereof, or of the free use of any thing thereto appertaining. *Ib.* 603

5 Our statutes of forcible entry and detainer do not affect the common law right of entry to greater extent than the English statutes on same subject have been construed to affect such right in England. *Ib.* 604

6 Our statute does not take away the common law right of entry. *Ib.* 604

7 Person who has a right of entry, and who makes an actual entry in consummation of that right, can only be removed in mode pointed out by the statute of forcible entry and detainer. *Ib.* 604

8 Any forcible intrusion on a person so in actual possession is actionable. *Ib.* 604

9 And he may repel by force any forcible attempt to expel him. He must be removed *secundum legem.* *Ib.* 604

10 When a person is in the actual possession of his own land, he has a right to expel, with force, any forcible disturbance thereof. And his son, acting under his authority, is equally justifiable. *Ib.* 61

11 If, in the absence of the person who is in actual possession of land, and no party or privy to the judgment in ejectment the sheriff under a *habere facias* puts the plaintiff in the judgment in possession, but neither the plaintiff, nor any other person for him remain in possession, and the person, who held the actual possession at the execution of the *habere facias*, returns and continues to occupy the land, he is not guilty of a forcible entry or detainer. *Kercheval &c. vs Ambler,* 628

12 Such proceeding is not an actual 88

eviction of the person who is in actual possession. *Ib.*

629

- 13 After a traverse to the circuit court of an inquisition of forcible entry, it is too late to object to any irregularity in the warrant, or other preparatory proceedings. *Williamson vs Boucher,*

252

### Former Recovery.

See Joint Obligors.

### Frauds, statute of.

- 1 For the statute of frauds, 1 Dig. 617, to operate to render slaves loaned subject to creditor of bailee, there must be five years continued possession in Kentucky; possession in another state cannot be taken to possession in Kentucky, so as to eke out the limitation. *Fightmaster et al. vs Beasley,*

412

- 2 *Lex loci possessionis* determines the consequences of possession under loans, and the law of Kentucky regulates the liability of property to execution. *Ib.*

413

- 3 Acquiescence of parent in children's claim neither concludes his creditors, nor bars him or his administrators or executors from asserting right to the property. *Ib.*

414

- 4 See Assumpsit, 10.

- 5 See Voluntary Conveyances.

- 6 See Trusts, 1.

### Gaming.

- 1 See Assumpsit, 3.

- 2 Statutes against gaming to be

construed strictly. *Greathouse vs Throckmorton,*

23

- 3 A owes B money won at faro; B owes C; A applies to C to pay B, which C does by discharging B from the same sum due to C from B, which A owed B: C sues A for money paid, &c.: it is no defence to allege the consideration between A and B, and B and C to have been money won at faro. The consideration upon which C founds his action, is the surrender of his claim upon B, and his discharge of A's debt to B, at the instance and request of A. *Ib.*

23

### General Court.

- 1 General court no jurisdiction where some of the complainants and some of the defendants are residents and some non residents; the facts to sustain the jurisdiction must be averred, or appear in the record, the jurisdiction being special. *Hare's Heirs vs Bryant's Administrator,*

377

- 2 Statute 127 does not give general court jurisdiction over the cases it provides for. Jurisdiction of circuit court is exclusive. *Ib.*

377

### Gift, deed of.

See Deed, 4, 6, 7.

### Guardian and Ward.

- 1 Anciently, guardians were held responsible for the sufficiency of all personal security which they ventured to take for the estate of their wards. And executors were held to the same strict responsibility. *Smith et al. vs Smith,*

238

- 2 But such a trustee was not res-

possible if he loaned the trust fund on *real security* deemed good at the time of the loan, or vested it in the *public funds*. *Ib* 238

3 Guardian, who had vested the estate of his ward in stock in the Bank of Kentucky, held, under the circumstances, responsible for the full amount of the fund so vested, notwithstanding stock in the Bank of Kentucky had greatly depreciated after the investiture of the ward's estate in it. *Ib*. 239

4 Stock in the Bank of Kentucky is not "*public funds*." *Ib*. 239

5 Guardian should, in the preservation of his ward's estate, not only observe good faith, but should act vigilantly and circumspectly. *Ib*. 239

6 County court has no jurisdiction or power to appoint a guardian for an infant while the father of the infant is alive. *Poston vs Young*, 501

7 An orphan, in legal parlance, is a fatherless child. *Ib*. 501

## Heirs.

Liability of heirs limited by the value of estate descended, and not chargeable with interest on that value. *Ellis vs Gosney's Heirs*, 110

2 In suit against heirs, after judgment has been obtained against the executor or administrator, the declaration must show that proper steps have been taken against the executor or administrator, and that they have resulted "in a judgment of record or a return of the proper officer," manifesting a want of property of the deceased in the hands of his personal representative to satisfy the debt. *Mills vs Sale*, 251

3 At common law, heirs only responsible on covenant of ancestor, when expressly bound. Then only, to the extent of assets descended and not alienated prior to suit. *Ready's Heirs vs Stephenson*, 351

4 Statute of 1796, 1 Dig. 627, altered the common law, relative to the liability of heirs; but did not alter the mode of pleading. *Ib*. 352

5 Act of 1811, 1 Dig. 535, applies to heirs as well as administrators and executors, and relieves from the common law consequences of false pleading and judgment by default. *Ib*. 352

6 Since the act of 1811, heir is not responsible beyond the estate descended, though judgment by default or false plea and judgment should be to subject that estate only. *Ib*. 353

7 Act of 1811, 1 Dig. 535, construed and applied. *Ib*. 354

8 Same judgment should be rendered upon verdict vs. heirs upon plea of *riens per descent*, which would be rendered vs. executor or administrator upon plea of *plene administravit* found vs. them. *Ib*. 354

9 Joint judgment vs. several heirs, all insolvent but one, he would not be liable for the whole amount. *Ib*. 354

10 If estate have been alienated, creditor may subject heir personally by proceedings on judgment vs. estate descended, and proving alienation. *Ib*. 354

11 In joint action vs. personal representative and heir not expressly bound, judgment to be rendered vs. all in the same way. *Ib*

12 The object of the act of 1811

- was to relieve executors and heirs from the rigor of the common law. *Ib.* 355
- 13 The 1st section applicable to heirs, whenever in like case it would apply to executors or administrators. *Ib.* 355
- 14 If upon proper issue verdict do not find the estate assessed to have been alienate, judgment must go vs. estate descended, not *de bonis propriis*. *Ib.* 355
- 15 Bill vs. heirs to subject land to judgment vs. personal representative, plaintiff in judgment and defendant must be parties. *Hare's Heirs vs Bryant's Administrator*, 375
- 16 Land can only be subjected by judgment or decree vs. heirs for the original debt, not to judgment vs. executor or administrator. *Ib.* 376
- 17 Statute 1827, Session Acts, 158, alone authorizes proceeding vs. heirs where there is no actual service of process, and then requires the allegations of the bill to be proved "according to the rules of evidence in actions at law." *Ib.* 376
- 18 Quere, whether statute of 1827, authorizes decree subjecting land to payment of damages assessed for breach of covenant prior to Dec. 1792. *Ib.* 377
- 19 See Co-obligors, 1.
- 20 See Covenant, 2.
- Heirship.**
- See Evidence, 2.
- Husband and Wife.**
- 1 Although the husband has by an ante-nuptial contract agreed that the wife may retain and control, in all respects as a *fee sole*, the land and slave owned by her before the marriage, yet if she permit the husband to enjoy jointly with herself the use of the slaves, she cannot recover from the representatives of the husband the value of the use of them by the husband. *Dorsey's Representatives vs Dorsey*, 159
- 2 See Slaves.
- 3 See Witness.
- Improvements.**
- 1 That plaintiff had no notice of the time when commissioners met to assess the value of improvements, is good ground for quashal of commissioners' report. *Bell's Heirs vs Harnet*, 379
- 2 Although occupant has gone to *extraordinary* expense in the clearing and improvement of land, he is not entitled to an extraordinary compensation therefor, but is only entitled to the *ordinary* value of clearing in the *ordinary* way; and such occupant should be charged with rents, in a similar manner, according to the *ordinary* value of such land cleared in the *ordinary* way. *Ib.* 381
- 3 Allowance by commissioners, of three dollars and fifty cents per tree for the mere "*planting*" of an orchard, is exorbitant. *Ib.* 382
- 4 How to ascertain the value of apple orchard put upon the premises by occupant, and the quantum of rent that occupant should pay for the land on which the orchard stands. *Ib.* 382
- 5 To sustain a peremptory judgment or decree against occupant for assessed value of improvements, the record must show that

occupant elected to pay for the improvements and take the land.  
*Cle vs Damron,*

598

6 See Partition, 1.

### Indemnity, bond of.

See Sheriff.

### Indictment.

See Slaves, importation of.

### Infants, land of.

1 Act of 1813, which authorizes the sale of the real estate of infants, should be strictly construed. *Pryton's Heirs vs Alcorn,*

502

2 Chancellor cannot, without the consent of the infant or his guardian, decree the sale of infant's land. *Ib.*

502

### Injunction.

1 Collection of a sale bond given on the purchase, under execution, of a tract of land to which defendant in the execution had no title, will, if it appear that the sale was made at the instance of the plaintiff in the execution, be enjoined. *Bartlett vs Loudon,*

642

2 See Damages, 1, 2.

### Insimul Computassent.

See Assumpsit, 4.

### Instructions to Jury.

1 The court may instruct the jury without being moved so to do,

but is not bound to instruct unless requested so to do. *Clark vs Baker,*

197

2 When instructions to the jury are requested of the court, it is bound to decide upon them in the form in which they are draughted and presented to the court; but it is not bound to mould them into the proper form. *Ib.*

197

3 General rule is, that the court should not give instructions on mere abstract points of law. *Ib.*

197

4 An instruction, however pertinent or applicable it may be, is abstract unless it be made to apply, in express terms, either to the attitude of the parties, or the very facts in issue. *Ib.*

198

5 When facts conducing to conclusion are given in evidence, it is error in the court to instruct the jury peremptorily. It belongs to the jury to decide. *Trotter vs Sanders et al.*

321

6 Jury sworn to try an issue or issues embracing entire declaration, not erroneous for court to refuse to instruct the jury to disregard counts that may be faulty, there being such basis laid as will sustain a general verdict and judgment. *French vs Frazier's Administrator,*

499

7 See Non-Suit, 1.

### Interest.

1 As a matter of law, a receipt for money does not charge recipient with interest. *Bell's Administrator vs Logan,*

594

2 In such case, it is matter of discretion with the court or jury whether to allow it or not. *Ib.*

594

3 Recitation in a covenant of a



not for money, decided not to charge respondent with interest as a matter of law. *Id.*

594

4 On a note executed and payable in New Orleans, stipulating for the payment of eight per cent. interest, and there be no evidence in the cause showing what the rate of interest is in New Orleans, a judgment for principal and eight per cent. interest to time of the judgment is proper. *Gordon vs Phelps,*

619

5 But judgment charging obligor with eight per cent. interest from the rendition of judgment till payment, is improper. *Id.*

619

6 See Fee Bill.

7 See Partition. 1.

### Interlineation.

1 Addition to a bond, made by consent of both parties to the bond, does not avail it. *Berry et al. vs Berry's Heirs,*

437

### Issue, immaterial.

See Practice.

### Joinder.

1 In trespass by husband and wife, declaration contains two counts, one for an assault and battery of the wife, and one *de bonis asportatis*, to the property of the plaintiff, and verdict for plaintiffs, objected that there was a misjoinder of causes of action, that is, one in favor of the husband and wife, and one in favor of the husband alone, decided, that, as the husband and wife might, before coverture, have had a joint right to the goods taken, the court will (to sustain

the verdict) presume that the taking was before coverture, and therefore the cause of action joint. *Williams vs Hudson et ux.*

218

3 Error to join causes of action, *ex delicto* and *ex contractu.* *Trundle vs Arnold,*

408

### Joint Obligors.

1 Merger of the contract as to one jointly bound, operates as a merger as to all jointly liable. *Scott et al. vs Colmesnil,*

418

2 Judgment vs. one, upon a contract upon its face his sole individual contract, and as such sued upon, no bar to subsequent action upon it in its true character of a joint contract. *Id.*

429

3 Quere—Whether judgment on a contract described to be sole, when it was known to the plaintiff to be joint, would bar future action against others jointly liable? *Id.*

421

### Joint Tenants and Tenants in Common.

1 One joint tenant or tenant in common, is responsible to his cotenant, for waste or for receiving more than his proportion of the rents and profits of the estate so held. *Nelson's Heirs vs Clay's Heirs,*

138

2 If one tenant in common or joint tenant enter upon land yielding no rent, and improve the same by his money or labor, the cotenant expending neither money nor labor, he is entitled to the exclusive benefit of the rents or profits thus produced. *Id.*

139

3 The statutes of Ann and of Virginia give a remedy for the recovery of profits growing out of an estate from its condition

when acquired, or produced by the joint labor or expenditure of the co-tenants. *Ib.*

141

4 In partition between joint tenants or tenants in common, one having entered upon the land and improved it, he will be protected by the court, and his improvements assigned to him if practicable—making no allowance in division for the enhanced value of the land. *Ib.*

141

5 If in partitioning land, it cannot be so divided as to allot unimproved land to such joint tenant, or tenant in common, as may not have contributed to the improvement, still he will not be entitled to charge his co-tenant rent for the portion of improved land which he may obtain, nor has the improver a right to charge for improvements. *Ib.*

142

## Judgment.

1 Judgment on either a *special verdict*, or on demurrer to evidence, is a *bar* to any future suit on the same cause of action. *Hunt vs Terril*,

69

2 If plaintiff desire not to be *barred* (from another suit on the same cause,) by a judgment on a *special verdict* or on a demurrer to evidence, he should waive his evidence, and suffer a *non-suit*. *Ib.*

3 A judgment on the merits which will bar any future suit at *law*, will also bar a suit in chancery for the same cause of action. *Ib.*

70

4 See Co-Obligors, 1.

5 See Joint Obligors.

## Judgment, foreign.

See Chancery Practice.

## Judicial Knowledge.

1 This court does not judicially know how the laws of Maryland distribute decedent's estates. *McDaniel vs Wright*,

478

## Jurisdiction.

1 Fact that the note or obligation which was the foundation of the common law action, and on which a judgment has been obtained, was not the act and deed of the defendant in the action, will not, *per se*, give the chancellor jurisdiction to enjoin the judgment. *Harrison vs Lee &c.*

174

2 When the note or obligation sued on is not the act and deed of the defendant, he should defend himself *at law*. *Ib.*

172

3 When cause of action transitory, circuit court alone of the county in which defendant resides, has jurisdiction, unless process be executed in the county in which suit is commenced, or unless defendant, by his appearance and answer, or agreement, waive objections to jurisdiction, no allegations of the complainant's bill can give jurisdiction. *Cowan vs Montgomery*,

299

4 The ct. cannot take the bill for confessed, nor make any order upon defendants, until jurisdiction is obtained. *Ib.*

299

5 Statute which authorizes the impeachment of the consideration of specialties by plea *at law*, has not ousted the chancellor of the pre-existing jurisdiction which he possessed of relieving against obligations when the en-

the consideration had failed in consequence of obligee's delinquency. *Wood et al. vs Kendall et al.*

216

6 And the chancellor yet has jurisdiction in such cases, provided no attempt to impeach the consideration has been made at law. *Ib.*

216

7 Chancellor has no jurisdiction to enjoin a judgment on the ground that the obligation on which it was rendered, was delivered as an escrow. *Ib.*

216

8 See Lien.

9 See General Court.

10 See Chose in Action, 1.

11 See Guardian and Ward, 6.

12 See Surety, 3.

13 See Fee Bills.

14 See County Levy, 2, 3.

15 See Contract, 1.

### Jury, instructions to.

See Instructions to Jury.

### Lands.

1 See Infants, lands of, 1, 2.

2 See Public Lands.

### Land, conveyances of.

1 Conveyance of land, certified by justices of any other county than that in which the land lies, does not pass the title from vendor, unless the certificate shew not only that the conveyance was acknowledged, but also subscrib-

ed by him in their presence. *Kug vs Jones,*

39

2 See Specific Performance.

### Land, devise of.

See Devise.

### Land, sales of.

1 If answer admit a sale of land, it is proper to decree a conveyance of it, although there be no memorandum, in writing, of the sale. *Brewer vs Peed,*

233

2 Land held in adversary possession, not subject to sale under execution. *Griffith vs Huston &c.*

388

3 Where sheriff on the sale of a tract of land, announced to the bidders that a greater amount was due in virtue of the execution than was really due by it, and the land is sold "for the amount of the execution," the sale will be quashed. *Carlile vs Carlile,*

625

4 One year is not a bar to a motion to quash such a sale. *Ib.*

625

5 Statute of 1811, limiting motions to quash sales of land, does not embrace a motion to quash a sale of land for such a cause as is made out in this case. *Ib.*

625

### Levy.

1 See Execution, 4, 5, 10.

2 See Equity of Redemption, 1.

**Liberum Tenementum.**

See Trespass, action of.

**Lien.**

- 1 Who are necessary parties to a bill by vendor to enforce an equitable lien on land conveyed by him, and afterwards conveyed by his vendee to others, and sold by execution against vendee. *Clark vs Hunt*, 243
- 2 Chancellor has jurisdiction *in rem*, independently of any statute, to subject the land of a non-resident debtor to the satisfaction of the equitable lien for the payment of the purchase money for the land. *Ib.* 247
- 3 On a bill by vendor to enforce his lien on land for the payment of the purchase money, the omission to give a day (by interlocutory decree) for the payment of the money, is error. *Ib.* 247
- 4 Person who holds merely a title bond for the conveyance of land, and sells the land, and assigns the title bond, retains a lien on the land for the payment of the purchase money, in same manner, and to same extent, as if he had conveyed the land by deed. *Wiseman's heirs vs Reid*, 249
- 5 Lien exists in favor of assignor vs. assignee of title bond for land whilst it remains with assignee. *Ligon vs Alexander*, 289
- 6 Vendor of equitable right to land has a lien for the consideration, whenever vendor of legal right, under similar circumstances, would have an equitable lien. *Ib.* 289
- 7 Lien upon land for the purchase money does not depend upon VOL. VII. 89

whether the proprietorship is evidenced by legal or equitable title: it results from the right the vendor has to make the land answerable for the price for which it was sold. *Ib.* 289

- 8 Vendee is trustee to vendor of the estate for the unpaid purchase money, and all persons claiming under him, no matter how remote, who have notice of the trust, stand in his shoes. *Ib.* 290
- 9 In such cases, it matters not whether the first transfer be by assignment of a bond for a title, or by conveyance, or whether with or without covenant of warranty. *Ib.* 290
- 10 In such cases, the liens from first assignor to last assignee to take precedence according to priority, as they would were the transfers all made by deed. *Ib.* 290
- 11 Statute authorizing the assignment of bonds &c. does not operate upon the lien of assignor of bond for land, nor prevent his pursuing it in the hands of remote assignee. *Ib.* 290
- 12 See *Lis pendens*, 1.

**Limitation, statute of.**

- 1 Five years adverse uninterrupted possession of slaves invests the possessor with so perfect a title, that he can recover them from the former owner who may have obtained possession of them wrongfully. *Clark vs Baker*, 200
- 2 Statute of limitations is one of the wisest enactments of our code. *Ib.* 201
- 3 If A, who, as a vendee under an

executory contract, has been in possession of land for seventeen years, enters into an agreement with B, (an adversary claimant,) by which he surrenders to B the possession, and then, after he has held possession three years, brings his suit in chancery against A's vendor, relying on his elder entry, prays for a relinquishment by A's vendor of his elder legal title, the chancellor will consider B's three years possession as the possession of A's vendor, and by connecting the seventeen years possession of A with the three years possession of B, make out twenty years possession in A's vendor, and therefore refuse to give relief to B. *Beal vs Brook's Heirs*--and--*Reed vs Same*,

232

4 If A, who owns a tract of land of a thousand acres, has been in possession fifteen years, and then sells one hundred acres to B, on which no improvement had been made prior to the sale, and thereupon B immediately enters, makes improvements and continues six years in possession, in such a case, the senior patentee could not evict B, because, by counting the six years possession of B with the fifteen years possession of A, there would be twenty years adverse continued possession against the senior patentee. *Ib.*

235

5 Person who entered and holds land by executory contract and lease of one, cannot, by giving him notice that he disclaims to hold any longer under him, and that he has purchased of and will hereafter hold under another, thereby stop the statute of limitation from running against the claim under which he thus attempts to shield himself from the rightful authority of his landlord. *Myers vs Ruford &c.*

250

6 Seven years occupancy, to constitute a bar, must have been ac-

quired and held by actual settlement. *Ib.*

251

7 Whether a suit, by motion, falls within the terms of the proviso contained in the sixth section of the statute of limitation so as to save the remedy in any common law action--*Quere. Lansdale vs Cox*,

252

8 Party sued, by motion, before five years, and after the lapse of five years, his motion was dismissed; he then, within one year from the dismissal of his motion, filed his bill in chancery setting up the same claim, decided that the claim comes within the spirit and policy of the proviso contained in the sixth section of the statute of limitation, and therefore was not barred. *Ib.*

254

9 To escape the statute of limitations, there must be proof of a promise to pay, or of an express acknowledgment of a valid subsisting debt within five years. *French vs Frazier's Administrator*,

431

10 An adverse possession may be changed by the agreement of the parties into a friendly one, and the operation of the statute of limitations thereby defeated. *Smith vs Morrow*,

444

11 Before the right of the elder put into to enter upon the land is tolled, there must be twenty years adverse possession *in fact*. *Ib.*

446

12 Statute of limitations does not commence running from time an individual manifests an intention to clear and use land as his own. *Ib.*

446

13 An entry, with an intention to possess, made by a junior patentee within the lap, is not sufficient to confer such a possession as will start the statute of limi-

tation to running, unless it be accompanied by a continued holding from that time, demonstrated by acts ripening into improvements made upon the interference. *Ib.*

447

14 Seven years actual occupancy of land, under title deducible of record, whether by one or more, provided they be connected with each other, by title or estate, as vendor and vendee, landlord and tenant, ancestor and heir, constitutes a bar in virtue of the act of 1809 against all adversary claimants. *White vs Bates,*

54

15 The settlement must be made upon the land "to which claim is asserted," and continued under adversary title deducible of record for seven years, before the statute of 1809 furnishes a bar. *Ib.*

541

16 Defendant must set up seven years law as limitation in bar of adversary claimant, or court will not extend the protection of the act of 1809. *Ib.*

547

17 See Rescission, 1, 2, 3.

### Limitation, plea of statute of.

1 Where a cause of action does not immediately arise upon the making of a promise, but results from a breach happening years after the promise is made, the plea of non assumpsit within five years is no bar. *Payne vs Smith,*

501

### Lis Pendens.

1 Property is attached at suit of complainant, and, *lis pendens*, he purchases the same property at a sale under an execution in favor of a third person against the defendant, and executes a sale bond for the price, decided, under the circumstances, that his

subsequent purchase was a waiver of his lien acquired by the *lis pendens*, and must pay off the sale bonds executed by him. *McConnell vs Hanley,*

529

### Loan.

See Frauds, statute of.

### Location.

1 Location made on removed certificate, granted by county court since 20th December, 1800, illegal and void, unless made with the county court; entry with surveyor not sufficient. Effect of 2nd sec. of act of 1804, 11 Dig. 759. *Underwood &c. vs Crutcher,*

531

2 Court will not presume location to exist, which is not shewn. *Ib.*

531

3 See Settlement, certificate of.

### Mills.

1 Applicant for leave to erect a mill dam, where he owns the land on one side of the stream only, must own the bed of the stream, or the title to it must be in the Commonwealth. *Hamilton vs Adams,*

248

2 Record of the county court must show that applicant for erection of a mill dam has such title to the land on which the dam is proposed to be erected as the law requires him to have. *Ib.*

248

### Mistake.

1 If, upon adjustment of accounts, a mistake is made, and a wrong balance is struck by overlooking a demand on either side, the

charcoal will relieve. *Wagoner vs. Minkler et al.*

175

### Mortgage.

1 In consideration of \$200 paid to him, A executes to B an absolute bill of sale of a slave; on the same day, B binds himself to reconvey the slave to A; however the \$200 are paid, provided the slave was living at that time; but if the slave died before the payment of the money, then A was still to be bound for the money, decided, that the contract between the parties was a mortgage intended to secure the \$200 advanced, and that it was designed to balance the interest of the money against the services of the slave, and was so far usurious, and that all that B could demand was a return of his \$200, with interest, subject to a credit to the amount of the value of the services of the slave. *Bishop vs. Rutledge,*

218

2 When a writing states the consideration of the delivery of a slave to be a loan of money and that the slave was delivered to the lender as collateral security, the contract is a mortgage or pawn. *Hart vs. Barton,*

322

3 The right of redemption attaches equally to pawns and mortgages, and "once a mortgage always a mortgage" is not more true than once a pawn always a pawn. *Ib.*

323

4 The common law recognizes no agreement for preventing the redemption of pawns. *Ib.*

323

5 Where one party has a right to redeem, the other has a right to sue for his money; & the death of a slave mortgaged or pawned, without culpable conduct on the part of mortgagee or pawnee, does not affect that right. *Ib.*

323

6 Though the particular species of bond in which a debt is entered be not enumerated in recital, yet the intention of the parties being to indemnify against all sureties which mortgagees might enter into for mortgagee, the court enforces the mortgage to extend to each bond. *Nelson's Heirs vs. Byce &c.*

400

7 So far as notice results from recording deeds, the notice regard the transfer of the legal title only. *Ib.*

404

8 A prior mortgagee is not bound to know the subsequent transactions between his mortgagee and third persons; advances made or liabilities incurred on the faith of his mortgage, cannot be superseded by subsequent mortgage upon constructive notice, resulting from mere registration; there must be actual notice prior to such advance or responsibility. *Ib.*

404

9 Sale of equity of redemption, by sheriff, does not affect prior mortgagee, without actual notice of sale. *Ib.*

406

10 If residue of mortgaged premises will satisfy mortgage, chancellor will protect intermediate purchaser of part of the land, when sale is decreed. *Ib.*

406

### Motion.

1 It is not necessary, in motions, to observe the same technical strictness which is required in pleading. *Logan vs. Steel's Heirs,*

42

1 Errors in fact and in law may be joined, in a motion to quash an execution, or in a rule to shew cause why an execution or sale shall not be quashed. *Ib.*

42

3 See Fee Bills, 3.

## Motions, limitation of.

See Land, sales of, 4, 5.

## New Trial.

- 1 General rule is, that whatever would have been good cause of challenge may, if unknown at the proper time for a challenge, be sufficient cause for a new trial. *Moody's Executor vs Pearce*, 222
- 2 Whether discovery after the trial that some of the jury were aliens or unnaturalized citizens, is sufficient ground for a new trial? *Quere. lb.* 222
- 3 Alleged surprise at the rejection of a copy of a writing, not evidence competent to prove a fact, not such surprise as would justify a new trial. *Morgan's Heirs vs Marshall*, 317
- 4 If there be two or more defendants, and judgment is rendered jointly against them, either of them may move for and obtain a new trial against the will of his co-defendants. *Palmer vs Kennedy*, 500

## Nominal Plaintiff.

- 1 See Writ of Error.
- 2 See Practice.
- 3 See Suit, dismissal of.

## Non-Suit.

- 1 If by any possible deduction from facts proved on trial, a right of action might be sustained, error to instruct as in case of non-suit, absolutely. *Fightmaster et al. vs Beasky*, 411

## Notes, renewal of.

- 1 As a renewal of a prior note, there is executed to her a second note which includes one new obligor, and drops two of the original obligors; on this second note, after notice that it was a forgery, the bank brings suit, obtains judgment against one of the obligors, issues execution, and makes part of the money, decided, that the bank could not thereafter recover in a suit on the original note. *Bank of Commonwealth vs Ray &c.* 278

## Nul Tiel Record.

- 1 *Nul tiel record* is a good plea to an action of debt on an appeal bond, although the declaration merely avers the affirmance of the original judgment or decree, without concluding *prout patet per recordum*. *Bohannon vs Broadwell*, 32

## Obligation.

See Condition.

## Occupants.

- 1 Third section of act of 1812, relative to liability of occupants for rent, construed. *Cole vs Damron*, 596
- 2 If occupant enjoin or supersede the judgment, and eventually fail, he is chargeable with rent from date of the judgment. *lb.* 596
- 3 See Improvements.

## Officers.

See Execution, 2, 3, 4, 5.



## Opinion of Court of Appeals.

- 1 Principles settled when cause is remanded to inferior court to effectuate the opinions of the court of appeals conclude the parties. *Nelson's Heirs vs Clay's Heirs*, 138

## Orphan.

See Guardian and Ward, 7.

## Oyer.

See Practice.

## Parol Evidence.

- 1 Latent ambiguity may be explained by parol evidence. *Wilson vs Robertson*, 80
- 2 Parol testimony is admissible to aid and clarify the construction of a covenant, the terms of the covenant not being contradicted thereby. *Patterson et al. vs Garret*, 115
- 3 If a bill of sale be absolute on its face, parol proof of an agreement of the parties not admissible to prove it conditional, unless its execution has been procured by fraud or mistake. *Marshall's Administrator vs Cox*, 134
- 4 Parol testimony not admissible to contradict a written instrument. *Grundy vs Edwards*, 368
- 5 Parol testimony not competent to prove the contents of a record, but may prove facts connected with and resulting from or incident to a record. *French v. Frazier's Administrator*, 431
- 6 Parol testimony not admissible to explain a record, or to show

upon what ground a judge decided—the record itself showing the question to be adjudicated. *Hickman &c. vs McCurdy*, 556

- 7 See Evidence.

## Partition.

- 1 One having no agency in procuring an act of the General Assembly making partition of land, and not mentioned in it, cannot be affected by its provisions, nor by the preamble, and his title must remain unimpaired unless sold prior to the act. Such act is evidence only against parties and privies but not against him who had no agency in its procurement. *May's Heirs vs Fenton et al.* 312
- 2 On partition of land allowance of current interest on the amount paid, by one tenant in common, for improvements and taxes on the land, decided to be erroneous. *Talbot vs Todd*, 460
- 2 See Decree, 1, 2.

## Partners and Partnership.

- 1 One partner may, when called on by another, testify as to the rectitude of an account set up against the firm by the partner calling him as a witness. But the testimony of a partner, so called on as a witness, will be incompetent to diminish the accounts which may be set up against the firm, or to augment his own account against the firm by the other partners who did not call for his testimony. *Garner vs Beatty—and—Same vs Catron*, 225
- 2 Obligation of partners, at law,

- joint; in equity, joint and several. *Scott et al. vs Colmesnil*, 418
- 4 Judgment vs. one partner, merges the pre-existing joint liability of all the partners. *Ib.* 418
- 5 Dormant partner at date of note given by public partner, bound. *Ib.* 418
- 6 One partner can bind another by note not under seal, notwithstanding the act of 1812. *Ib.* 422
- 7 He who is to participate in the profits of a purchase is a partner. *Ib.* 423
- 8 Dormant partner not bound to give notice of dissolution. If dissolution prior to date of note evidencing debt of partnership, he is bound by the original assumption. *Ib.* 423
- 9 See Pleas and Pleading, 3.

### Party.

- 1 See Lien.
- 2 See Distribution, 5.

### Patent.

- 1 Though entry void, it does not follow that the patent issued upon it is void. *Underwood & Co vs Crutcher*, 532

### Patentee.

- 1 Uninterrupted possession of an interference by elder patentee, and a lapse of twenty years from emanation of a junior patent, is a bar to junior patentee's equitable title to the interference. *Sawyer vs Oliver*, 182
- 2 Person having legal title and

possession may maintain bill to compel relinquishment by junior patentee. *Underwood & Co vs Crutcher*, 532

- 3 Complainant with mere patent on void entry cannot have decree for "repose" vs. defendant, who has survey and junior patent, unless defendant's claim be void. *Ib.* 532

- 4 See Limitation, statute of.

### Pawn.

See Mortgage, 2, 3, 4, 5.

### Person and Property, defence of.

- 1 See Crimes, 1, 2.
- 2 See Spring Gun.
- 3 See Self Defence.

### Plaintiff.

See Nominal Plaintiff.

### Pleas and Pleading.

- 1 Modern practice looks rather to the substance of pleading than to its technical precision. *Arnold vs Trundle*, 117
- 2 A plea impeaching the consideration of a note or deed sued upon must be verified by oath. *Ib.* 117
- 3 A plea admitting a valid consideration, if representations of obligee had been true, but alleging the note or obligation to have been procured fraudulently, by false representations, needs no verification by oath of the party

- under the statutes of 1801 and 1815. 1 Digest, 257, 265. *Ib.* 117
- 3 To a joint declaration against partners, a plea by one that *they* did not assume within five years prior to the institution of the suit, is a good plea. *Fallandingham vs Dural &c.* 262
- 4 To debt on constable's bond, plea by two of the securities that the bond was delivered as an *escrow*, to be binding when executed by another, a good plea. *Carswell's Executors vs Rennick &c.* 281
- 5 Abs. Int. delivery of bond essential to its legal obligation. Plea averring a fact that shews there had been no such delivery, is equivalent to the general issue, and may conclude to the country. *Ib.* 282
- 6 Plea admitting such delivery, but setting up extraneous matter in bar, must conclude with a verification. *Ib.* 282
- 7 If the plaintiff take issue upon plea of delivery of bond sued on, as an *escrow*, or on condition, he may prove absolute delivery at any time prior to impleading of the writ. *Ib.* 282
- 8 If he reply matter *de hors* the plea by which to estop the parties pleading, he stakes his case upon the allegation, & judgment must be rendered against him, if it be not sustained. *Ib.* 282
- 9 Replication, that plaintiff was a "housekeeper," and that the horse levied on and sold by sheriff was his "only work beast," not good answer to justification for taking and selling in virtue of *fiery facias* vs plaintiff in trespass. It should aver that he was an actual *bona fide* housekeeper with a family. *Prewitt vs Walker,* 332
- 10 Since the abolition of special demurrers, duplicity does vitiate a plea. *Bryan vs Buford,* 335
- 11 If defendant desire to avail himself of an obliterated endorsement upon a note, he must shew, by plea, that it affects the contract, and the obliteration was without his assent. Demurrer will not avail. *Warner's Executor vs Spencer,* 340
- 12 To debt on specialty, neither statute of limitations nor *nil debet* is a good plea. *Scott vs Colmesnil,* 417

### Possession.

- 1 Possession sufficient to maintain action vs. wrongdoer, but not against one having the color of title. *Fightmaster et al. vs Bearley,* 413
- 2 See Time, lapse of, 1.
- 3 See Fraud, statute of, 2.
- 4 See Limitation, statute of, 1:

### Practice.

- 1 When defendant's plea is *insufficient* and plaintiff joins issue thereon, defendant cannot arrest the judgment on the ground of the immateriality of the issue. *Wriston vs Lacy,* 219
- 2 When there was no *oyer* craved of a writing mentioned in a plea, such writing does not constitute a part of the record; and it will be taken to be such a writing as it is described, in the plea, to be. *Ib.* 220
- 3 A mere agreement to dismiss a suit is not pleadable. *Ib.* 220

- 4 To constitute a bar to the prosecution of a suit, there must be an accord, as to the whole cause of action, for valuable consideration actually received from the defendant. *Ib* 220
  - 5 Agreement to permit one suit to abide the decision of another, if established, would be effectuated by the court. *May's Heirs vs Fenton et al.* 309
  - 6 The opinion of the court, deduced from facts in one case, cannot control another, though the subject matter be the same and the facts chiefly the same, when the facts are not precisely the same, and the case is not between the same parties or privies. *Ib.* 309
  - 7 Contents of a deed cannot be proved, by parol, unless affidavit of its loss or destruction; then execution and stipulations to be established by subscribing witnesses if to be had, if not, by other legitimate testimony, declarations of grantor &c. *Griffith vs Huston &c.* 387
  - 8 Where appellate court has ordered a suit, for the same cause of action, to be dismissed absolutely, it is a final disposition of that suit, and it is not necessary for the plaintiff therein to wait until the order is entered in the circuit court before he commences another. *Gordon vs Phelps,* 620
  - 9 Person who is not a party to a judgment in ejectment, is not concluded by the sheriff's return on *habere facias* thereon. *Kercheval &c vs Ambler,* 627
  - 10 When two persons occupy the same land, whether there is such a privity between them as to authorize the eviction of both of them under a *habere facias* against one of them, should be left to the jury to determine, and should not be decided by the court. *Ib.* 627
  - 11 When nominal plaintiff has assigned the benefit of the suit to another, and afterwards given to defendant a receipt against the debt, the question whether defendant had notice of the assignment of the benefit of the suit before he paid it, must be decided by a jury, and not by the court. *Marr vs Hanna,* 645
  - 11 See Bill, dismissal of.
  - 12 See Suit, dismissal of.
- Principal and Agent.**
- See Rescission, 4.
- Principal and Security.**
- See Surety.
- Prison Bounds.**
- 1 Act of 1822, extending the prison bounds to the limits of the state, did not operate in favor of debtors confined under process from the courts of the U. States. *Moore vs Allen &c.* 652
  - 2 See Bonds.
- Process, service of.**
- 1 Service of writ on party convicted of felony is valid. II Dig. 1223. *Smith vs McGlasson.* 154
  - 2 If any extraneous fact to render service of a writ illegal, it should be pleaded, so that its truth might be tried. *Ib.* 154
- Promissory Notes.**
- 1 See Endorsement, 1, 2.
  - 2 See Consideration, 2, 3.

**Property, trial of right of.**

- 1 See *State ex. v. Brown*, 2nd ed. of report, 432.

See Interest.

**Record, copy of.**

- 1 Record made out and sworn to be correct, by one not clerk, the clerk having died, no successor appointed when necessary to file the record, admitted to prevent dismissal of appeal. *Clay vs Rogers*, 38

**Public Lands.**

- 1 Tenth section of the act of 1815, which provides for the appropriation of the waste or unimproved lands of this Commonwealth. *Hall's Lessee vs Ford*, 574

**Re-hearing.**

- 1 As the legal effect of granting a re-hearing is a revocation of the opinion delivered, therefore, if after a re-hearing has been granted, the court become equally divided in their opinions, the judgment below stands affirmed. *Stearrett vs Lockhart &c.* 554

**Publication.**

- 1 Certificate of publication to which the order is not attached, does not prove that the order made by the court has been published, and is, therefore, insufficient proof of compliance with the act. *Fennell vs Combs*, 247

**Release.**

- 2 Order of a libelation is required to be certified by the printer, not the editor of the paper. *Sprague vs Sprague &c.* 331

Answer put in waives irregular authentication of order of publication. *Id.* 331

- 1 Release in fact, or by operation of law, of a cause of action, or contract, against one of several persons jointly bound, or even bound jointly and severally, extinguishes the liability of all. *Hunt vs Terrill's Heirs.* 67

- 4 Certificate of publication must be in the record or decree deemed *ex parte* and void. *Trygell &c. vs Gilk &c.* 439

- 2 Construction given to a certificate of release, by which it supposed to be executed in part and in part executory. *Franklin's Administrator vs Hart*, 338

**Purchase Money.**

- 1 See Lien.
- 2 See Assumpsit, 10.

- 3 See Administrator, 11.

**Renewal of Notes.**

See Notes, renewal of.

**Quia Timet.**

See Chancery Practice, 13

**Rent.**

- 1 Third section of act of 1812, relative to liability of occupants

for rent, construed. *Cole vs Damron*, 596

- 2 If occupant enjoin or supersede the judgment, and eventually fail, he is chargeable with rent from date of the judgment. *Ib.* 596

### Replevin, action of.

- 1 To maintain replevin, plaintiff must have had possession of the property or the right to the possession at the time of the caption, and the taking must have been illegal. *Dillon vs Wright*, 11
- 2 Replevin will not lie for taking property held adversely to plaintiff. *Ib.* 11
- 3 In replevin, avowry by defendant that is constable he had an execution in his hands against the mortgagor of the property in contest, that he levied it upon the equity of redemption and took the property into his possession for the purpose of selling the equity, held to be good. *Philips vs Morris*, 279

### Report.

See Auditor.

### Rescission.

- 1 Lapse of five years is a bar to a bill for rescission of a contract on the ground of mistake. *Carnells vs Parker's Administrators &c.* 455
- 2 In such cases, the time will not commence running until the discovery of the mistake. *Ib.* 456
- 3 On bill for rescission of a contract on ground of mistake, filed five years after the making of the contract, if the bill fail to allege

or to give any reason for presuming that the mistake was first discovered within five years next before the institution of the suit, and defendant has plead the statute of limitations, the plea must prevail. *Ib.* 456

- 4 Contracts between agents and their principals, as between others standing in confidential relations, should be zealously scrutinized by the chancellor, and slight circumstances of inequality, surprise or hardship, may be sufficient to vacate them, even, sometimes, without proof of actual fraud. *McDaniel vs Wright*, 476

### Restitution.

- 1 To authorize the court to grant, upon rule or motion, a restitution of money paid under execution, there must be record evidence that the person against whom the order of restitution is asked, has received the money, and also that he was a party to the suit or judgment. *Outen vs Palmateer*, 241
- 2 When restitution of money paid under a judgment or execution is desired, if there be no record evidence that the plaintiff has received it, or no record evidence that the person who did receive was a party to the judgment, the remedy is by *scire facias* or other suit in which matters *in pais* may be tried and ascertained by a jury. *Ib.* 242
- 3 If a plaintiff purchase slaves, or other property, under execution, the subsequent reversal of the judgment does not divest him of his right to the slaves, or other property, unless the only cause of reversal be some irregularity in the judgment or sale, to which, as a party, he was privy. *Ib.* 242

4 Otherwise, in such case, the price for which the slaves or other property sold (as evidenced by the sheriff's return) is the proper subject of restitution. *Ib.*

243

5 Upon reversal of decree money made in virtue of original decree to be refunded to the defendant so far as the property sold was his. Proof of property in another competent in mitigation. *King vs Dicken,*

372

6 Where a judgment in ejectment in favor of plaintiff, in the circuit ct. has been reversed by this court, and the tenant appears to be out of possession, yet if the record does not show that any *habere facias* issued, or that he was evicted by a writ, the court should not, on motion, award him restitution. *Frank's Heirs vs Hickman's Heirs,*

635

### Return.

See Constable.

### Reversal.

1 See Restitution.

2 See Evidence, 1.

### Revivor.

1 Order to revive in name of an executor, without stating that it was at his instance, the record not shewing that he had notice, cannot support a decree against him. *Smith's Executors vs Bryant's Executors,*

374

### Sales, quashal of.

See Land, sales of.

### Sale Bonds.

1 Bond which is valid to any extent, as a common law obligation, should not be quashed. *Debard vs Crow,*

10

2 Though execution issued on sale bond should be quashed for defect in bond, yet if the bond be valid to any extent, and obligees satisfied with it, erroneous to quash the bond on motion of obligor. *Ib.*

10

3 See Injunction.

### Scire Facias.

1 Plea to *scire facias* to revive in the name of plaintiff, as administrator, that he was not administrator, good bar. *French vs Frazier's Administrator,*

427

2 Plea to *scire facias*, that original plaintiff was not dead, good. *Ib.*

427

3 Defendant, in *scire facias*, is not estopped by administration granted by county court, nor by order of revivor in circuit court. *Ib.*

427

4 Judgment on *scire facias* to be for or against administrator. *Ib.*

427

5 The new parties introduced by *scire facias*, yet it is but one suit and one trial should be had. *Ib.*

428

6 The defendant may make new defence, but he is not precluded from the defence relied on by decedent. *Ib.*

428

7 Proper to try all the issues at once. *Ib.*

42

8 See Bail, 2.

### Seal.

1 See Corporations.

2 See Assignment, 2, 3.

## Secret Trusts.

See Trusts, 1.

## Security.

See Surety.

## Self Defence, right of.

- 1 The right of self defence is not derived from society, but is a right which every individual brings with him into society, and retains in society, except so far as the laws of society have curtailed it. *Gray vs Combs*, 484

## Set Off.

- 1 Chancellor will not set off unconnected demands, unless there exist extraneous circumstances which render it equitable to do so. *Turpin vs Turpin*, may
- 2 Though a party may not have a legal right to set off, yet if those who have right assent, he obtains an equitable right, and may maintain a bill in chancery to enforce it. *Jones vs Waggoner's Administrator*, 146.
- 3 Chancellor having possession of a case, by injunction, will do justice between the parties; the insolvency of the defendant being admitted, he will decree a set off against his judgment at law of damages growing out of breach of covenant, and being fixed by the contract and the law, he will assess them. *Ib.* 147

## Settlement.

See Administrator, 9.

## Settlement, certificates of.

- 1 In April, 1800, county court had no authority to grant certificate of settlement or location on removed certificates. *Underwood &c. vs. Crutcher*, 538
- 2 Third section of act of 1799. II Dig. 748, did not authorize county courts to give certificates of location. That power given 20th December, 1800. *Ib.* 533
- 3 Notoriety not required under the head right laws authorizing commissioners to grant certificates of settlement. *Ib.* 533
- 4 Difference between the commissioner system and county court system. *Ib.* 533
- 5 Upon defendant exhibiting survey and patent under the head right law, court will presume a regular certificate and entry. *Ib.* 535
- 37 6 Court will not presume against recitals in survey and patent, that there was no regularly removed certificate and no entry. *Ib.* 537
- 7 Though the settlement, in virtue of which county court granted certificate, be within appropriated land, yet the certificate not void; all the land not embraced by the certificate, and unappropriated by prior claim, may be held under such certificate. *White vs Bates*, 540
- 8 See Surveys.

## Shakers.

- 1 Bill against the Shakers, filed with a view to recover of them a demand under the statute of 1828, must describe them as a people who hold their property



in *Commonwealth v. The*  
*Trustees*, 427

in *Commonwealth v. The*  
*Trustees*, 427

### Slavery.

1 An act of a husband to a  
 wife, during coverture, is  
 void. *See* *Commonwealth v. The*  
*Trustees*, 427.

2 See *Commonwealth v. The*  
*Trustees*, 427.

3 See *Ex parte*, 14.

4 See *Fee List*.

### Slander.

1 When words spoken are innocent  
 of the imputation, the one  
 should not sue the other, but the  
 injury to determine in what sense  
 used. *Wells vs. Eaves*, 424

### Slaves.

1 Slaves held in dower, vest abso-  
 lutely in the husband by second  
 marriage during coverture, and  
 if he die, wife living, they are  
 assets in the hands of his execu-  
 tor or a administrator. *Hykes*  
*et ux. vs. White's Administrator*, 134

2 Statute of 1793, 34th section, II  
 Dig. page 1156, construed. The  
 words "as of his own proper  
 slave or slaves," mean a posses-  
 sion, *in jure*, in contradistinction  
 to a fiduciary possession.  
*Ib.* 135

3 The absolute right of a wife to  
 slaves for a term of years vests  
 in the husband, and they are as-  
 sets in the hands of his personal  
 representatives, should he die  
 before the wife. *Ib.* 135

4 Statute of 1797, imposing for-  
 feiture of slaves, held in dower,

5 Slaves held in part of their  
 value as security for a debt, are  
 not subject to execution, and  
 the wife is entitled to recover the  
 value of the same, and damages for  
 the loss of the same, and costs of  
 suit. *See* *Commonwealth v. The*  
*Trustees*, 427.

6 The interest of wife in dower,  
 vests absolutely in husband.  
*Flightmaster et al. vs. Baskin*, 4

7 Under will of record in Vir-  
 ginia, wife is entitled to a share of  
 slaves, which remain in Virginia  
 with the executor until after the  
 death of the wife, the executor  
 is not answerable to the court  
 for the same, as by law in Virginia  
 similar to the statute of this  
 state, which would make the  
 slaves immediately to be taken  
 possession of, more than a person-  
 alty, and the husband cannot  
 after death of his wife,  
 maintain a suit, in his own  
 name, to recover his wife's  
 share of the slaves. *Murdock*  
*vs. Linger et al.* 427

8 See *Devise*, 10, 11, 12, 13, 14.

9 See *Dower*.

10 See *Frauds*, statute of, 1.

11 See *Husband and Wife*.

12 See *Distribution*.

13 See *Limitation*, statute of, 1.

14 See *Deed*, 4, 6, 7.

15 See *Damages*, 3.

### Slaves, importation of.

1 Under act of 1815, importation  
 of slaves into this state is one

- offence, and selling of them is another. *Com'lt vs Thruston*, 63
- 2 The bringing of a slave into Kentucky, by a person not protected by any of the exceptions in the statute of 1815, although he intends to export, and afterwards exports the slave to another state for sale, is an *importation* into this state in violation of the statute. *Commonwealth vs Griffin*, 588
- 3 The importation of a slave into this state for any purpose, or by any person not authorized by the statute of 1815, is an indictable offence. *Ib.* 589
- 4 An indictment for importing slaves into this state, contrary to act of 1815, need not charge a *sale* of them. *Commonwealth vs Greathouse*, 590
- 5 *Importation* is one specific offence, and a subsequent sale is another and different infraction of the law. *Ib.* 590
- 6 Charge of illegal *importation* may be sustained without proof of a *sale*. *Ib.* 590

### Special Verdict.

See Judgment, 1, 2.

### Specific Performance.

- 1 Specific execution of an agreement denied, the agreement and proofs not rendering the rights of the parties clear and definite. *Waller's Heirs vs Brown*, 124
- 2 If complainant praying specific execution of an agreement to exchange land, fail to shew title to the land he contracted to convey, the court will not compel defendant to perform. *Ib.* 124

- 3 Complainant having performed his stipulations, specific execution enforced against defendant. *Ib.* 125
- 4 Bill to enforce specific execution of contract for exchange of land, complainant must show that the contract can be fairly and avaiably executed on his part. *May's Heirs vs Fenton et al.* 310
- 5 Contract to exchange with C for so much land as may be obtained by him for his interest as locator after the emanation of the patents, not a chancing bargain; nor is the fact of the land being patented, proof that it has been obtained; the party claiming execution of the contract must show the title safe. *Ib.* 310
- 6 Reversal of judgment at law vs complainant who seeks specific enforcement of the contract sued on, removes that barrier to granting relief. *Grun- dy vs Edwards*, 369
- 7 Chancellor will not, by enforcing a specific execution of the contract, relieve against a judgment at law fairly obtained through the negligence of the covenantor to convey. *Harris vs Kidwell &c.* 384

- 8 To decree a specific execution of a contract for the conveyance of land without requiring the payment of purchase money which is due, is error. *Brewer vs Peed*, 231

### Spring Gun.

- 1 Where a person has valuable property in a strong ware-house, well secured by locks and doors, it is lawful for him, as an additional security *at night*, to erect a spring gun which can only be made to explode by entering the house. *Gray vs Combs*, 485

2 And if a slave break and enter such ware-house in the night time with intent to steal, and is mortally shot by such spring gun, the owner of the ware-house, who erected the spring gun, is not responsible for the value of the slave. *Ib.*

### Suit, dismissal of.

1 When it appears that nominal plaintiff has assigned to another the benefit of the suit, a receipt given to the defendant by the nominal plaintiff, and which also directs a dismissal of the suit, is insufficient evidence to authorize the court to dismiss the suit. Such receipt is no evidence, against the beneficiary, that defendant has paid the debt. *Marr vs Hanna*,

644

### Surety.

1 Legatee and executor adjusted the sum due; legatee accepted note of executor, payable one day after date, for the amount; no further stipulation, nor agreement to give time or not to sue; failing to coerce the money from the executor, legatee sued securities in executor's bond, adjudged and decreed upon their bill filed, that this was not such a giving of time or indulgence, as discharged the securities. *Cooper et ux. vs Fisher &c.*

396

2 When surety pays debt of principal in property, the law does not imply an assumption on part of principal that he will pay security the value of the property; the extent of liability cannot exceed the amount of the debt. *Hickman &c. vs McCurdy*,

558

3 Liability of co-sureties for contribution, originated in equity, but now jurisdiction of court of law and of equity concurrent. *Ib.*

559

4 When surety stipulates with the creditor for all his rights as the principal, he can recover the whole amount due by principal, without reference to what he pays. *Ib.*

559

485 5 If no such stipulation, he can recover no more than a reimbursement. *Ib.*

559

6 If surety pay debt of principal, in money, he is entitled to sum paid and interest; if in property, he is only entitled to value of property and interest. *Ib.*

560

7 The same criterion, as to recovery from co-security. *Ib.*

560

8 Remote responsibility upon warranty does not affect the contribution of co-securities. That is regulated by actual loss. *Ib.*

562

9 To ascertain the liability of co-security, the value of property paid should be apportioned among the debts paid according to the several amounts. *Ib.*

563

10 If after a *fi. fa.* issued on a replevin bond, has been levied on estate of the principal obligor, sufficient for its satisfaction, it be stayed by order of plaintiff, and the property released, the surety in the replevin bond is thereby released, in equity, from the obligation of the replevin bond. *Alexander vs Bank of the Commonwealth*,

582

11 See Principal and Security.

12 See Appeal Bond, 1.

13 See Fee Bills.

14 See Execution, 3.

### Surveys.

1 Fifth section of the act of 1801, intended to secure surveys made

prior to the act, under the commissioner system, as made under the county court system, unless void. *Underwood &c. vs Crutcher*,

2 Where complainant exhibits a want of equity independent of patent, defendant need not exhibit his entry in such case as the present, because it is not a comparison of equities, and his survey is protected by the acts of 1801 and 1808, though it does not correspond with his entry. *Ib.*

## Tenants.

See Joint Tenants and Tenants in Common.

## Tenants in Common.

1 See Partition, 1.

2 See Trover, 1.

## Time, lapse of.

1 Where a party seeking relief has been always in possession of the land under a contract, lapse of time is no bar, but rather operates advantageously. *May's Heirs vs Fenton et al.*

2 See Rescission, 1, 2, 3.

3 See Limitation, statute of.

4 See Patentee.

## Title.

1 Relinquishment to the state, by person asserting himself agent, Vol. VII.

not operative upon holder of title unless agency proved. *Morgan's Heirs vs Marshall*,

534 2 Title afterwards acquired, by vendor without title, enures to vendee. *Griffith vs Huston &c.*

## Title Bond.

See Lien.

## Trespass, action of.

1 *Liberum tenementum* is good plea in bar to trespass. *Tribble et al. vs Frame*,

## Trial.

See New Trial.

## Trover.

1 One tenant in common cannot maintain an action of trover against another for the mere use of the entire chattel; there must be an actual or virtual destruction of the property. *Fightmaster et al. vs Beasley*,

2 If a stranger to an execution officiously undertake to point out, and direct the sheriff to levy on property which is not subject to the execution, and the sheriff sells the property so pointed out, such stranger is liable to an action of trover and conversion by the owner of the property so sold. *Young vs Moore*,

3 Plaintiff in an execution is not liable to an action of trover and conversion for sale of property under the execution which was not subject to it, unless he directed the sale. *Ib.*

## Trusts.

- 1 Deed of trust by an insolvent debtor, by which he conveys all his estate, real and personal, to be sold for benefit of one of his creditors, with a secret parol agreement between him and the creditor that part of the money for which the property might sell, should go to the debtor, decided to be *fraudulent*. *White vs Graves*, 525

## Use and Occupation.

Sec Assumpsit, 8, 9.

## Usury.

- 1 On contract to pay Commonwealth's paper, and interest thereon, it is not usury to exact the Commonwealth's paper and interest, notwithstanding the paper has appreciated since the date of the contract. *Turpin vs Turpin*, 37
- 2 Oblige assigns a note informing assignee that it is bearing an interest of 12 per cent. and promises that if obligor did not agree, when assignee should see him, to pay the 12 per cent. interest, he (obligor) would pay it. When assignee meets obligor, he agrees to pay the 12 per cent. interest, and renews the notes, including it. Decided, that, as obligor had not induced assignee to purchase the note, he would be relieved from the payment of the usury. *Denham vs Stone*, 176
- 3 Previous to the passage of the statute of 1819, A executed a

note, and B endorsed it, with a view to obtain for A the loan of a sum of money from C, and C loaned the money to A at an usurious rate of interest on the faith of the note, decided, that, it appearing that the transaction was an usurious loan of money by C, the note was void, and A and B absolved from all liability to C for the money loaned by him to A. *Owen vs Graves*, 530

## Vendor and Vendee.

- 1 Bill to recover from vendor, by deed with warranty, the purchase money alleged to have remained due original claimant of lot. Bill dismissed, there having been no eviction of vendee, nor decree or judgment of court compelling him to pay, nor proof that it was at the request of the vendor. *Blair vs Perry*, 168
- 2 He who enters upon land under an executory contract of purchase, cannot be evicted from possession by vendor, unless he shall, by some act, have converted his possession into a tortious possession, as by denying the title of vendor, refusing to quit upon sufficient notice and demand, and mere non-payment of purchase money will not be sufficient. *Harle vs McCoy*, 318
- 3 Title afterwards acquired, by vendor, without title, cures to vendee. *Griffith vs Huston & Co*. 396

## Verdict.

- 1 Not error to set aside a verdict predicated on an error of the court. *Fightmaster et al, vs Beasley*, 415

Voluntary Conveyances.

- 1 Whether a subsequent sale and conveyance for valuable consideration renders a prior voluntary conveyance absolutely null and void, or only affords presumptive evidence of its being fraudulent, subject to be rebutted by counter proof?—*Quere. Anderson vs Green,* 448
- 2 And whether notice, by subsequent purchaser, of the prior voluntary conveyance will give validity to the prior voluntary conveyance?—*Quere. Ib.* 448
- 3 In consideration of love and affection, and for advancement of his son, the father executes to his son a bond for the conveyance of a tract of land, the son marries, then sells the land and assigns the bond to his vendee, and after this, the father sells and conveys the land, for valuable consideration, to a person who had notice that the son had assigned the bond, decided, that the marriage of the son, and the assignment of the bond previous to the sale and conveyance made by the father for valuable consideration, rescues the bond and assignment from all previous liability to be avoided by the purchaser from the father for valuable consideration. *Ib.* 454

Warranty.

See Covenant.

Warranty of Title.

See Damages, 3.

Waste Lands.

See Public Lands.

Wills.

- 1 Two wills of the same person are presented to the county court for record, one of a more recent date than the other; the county court admit the elder will to record, and reject the more recent, and a writ of error is prosecuted to reverse the order admitting the elder will to record, decided, that, as the order of the county court rejecting the more recent will remains in full force, this court cannot, upon this writ of error, revise the order rejecting the more recent will, and consequently cannot, upon this writ of error, determine the elder will was revoked by the more recent. *Sanders &c. vs Sanders,* 504

2 See Devise.

Witness.

- 1 Defendant in chancery is a competent witness when his interest is equiportal between other parties. *Douglass vs Holbert,* 2
- 2 A witness will not, merely because he may subject himself to a civil suit, be excused from testifying. *Conillth vs Thruston,* 63
- 3 When the husband is the beneficial, though not the nominal, plaintiff in a suit, his wife is an incompetent witness. *Pyle vs Maulding,* 203
- 4 In trover, by trustee of wife, for conversion of trust property of wife, the husband is not a competent witness for trustees. *Hopkins vs Smith et al.* 263

5 See Partners and Partnership.

Writ.

See Process, service of, 1, 2.

## Writ of Error.

Purchase of land pending suit in circuit court, gives to the purchaser such an interest as will authorize him to prosecute a writ of error in the names of those whose title he may have acquired, without exhibiting any express power. *Mason et al. vs Peck,*

- 2 General rule is, that no person can maintain a writ of error who is not a party or privy to the re-

cord, or prejudiced by the judgment. *Marr vs Hanna,* 643

- 3 No perceptible reason why all other privies, as well as those by blood or representation, cannot maintain a writ of error. *Ib.* 143

- 4 Privy in interest may maintain a writ of error. *Ib.* 643

- 302 5 If, after nominal plaintiff has assigned to another the benefit of the suit, the court err in dismissal of it on the order of the nominal plaintiff, the beneficiary may maintain a writ of error. *Ib.* 643

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